

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

**BOSH INTERNATIONAL, INC  
AND  
B & P LTD FOREIGN INVESTMENTS ENTERPRISE**

*Claimants*

**- AND -**

**UKRAINE**

*Respondent*

**ICSID Case No ARB/08/11**

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**AWARD**

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*Members of the Tribunal*

**Dr Gavan Griffith QC, *President*  
Professor Philippe Sands QC, *Arbitrator*  
Professor Donald McRae, *Arbitrator***

*Secretary to the Tribunal*

**Ms Mercedes Cordido-Freytes de Kurowski**

*Legal Assistant to the Tribunal*

**Dr Chester Brown**

**Date of dispatch to the Parties: October 25, 2012**

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## **I. THE PARTIES**

1. The Claimants are Bosh International, Inc ('Bosh') and B&P Ltd Foreign Investments Enterprise ('B&P'). The first Claimant, Bosh, was incorporated under the laws of New Jersey, United States of America on 29 December 1992, and its registered address is 300 Glen Road, Woodcliff Lake, New Jersey. The second Claimant, B&P, was incorporated under the laws of Ukraine in May 1993. Bosh claims to hold a 94.5% shareholding in B&P.<sup>1</sup> The founder and owner of Bosh is Mr Leonis Shapsis, who owns 100% of the shares in Bosh. Mr Shapsis became a permanent resident of the United States in 1989 and acquired United States citizenship in 1995.<sup>2</sup>
2. The Claimants were originally represented by Mr Ari Gal Esq, of Law Offices of Ari Gal, 228 East 45<sup>th</sup> St, New York, New York 10017, United States of America; and Mr Richard Sillett, of William Z Schneider & Associates, PC, 1400 Avenue Z, Suite 402, Brooklyn, New York 11235, United States of America.
3. By letter dated 10 March 2011, the Claimants informed the Tribunal that Ari Gal and William Z Schneider & Associates had terminated their representation of the Claimants.
4. By letter dated 1 April 2011, the Claimants informed the Tribunal that they had retained Dr Todd Weiler, of #19 – 2014 Valleyrun Blvd, London, Ontario N6G 5N8, Canada, as well as Ms Martha Harrison, of Heenan Blaikie LLP, Bay Adelaide Centre, PO Box 2900, 333 Bay Street, Suite 2900, Toronto, Ontario M5H 2T4, Canada, to represent them in the arbitration.
5. The Respondent is Ukraine. At the First Session, the Respondent was represented by Ms Larysa Lischynska, Acting Head of Department, Department on Representation of Interests of the State in Courts of Ukraine and in Foreign Judicial Institutions, Ministry of Justice, 13, Horodetsкого Street, 01001 Kyiv, Ukraine. The Respondent's legal representatives are Mr John Willems, Mr Michael Polkinghorne, Ms Marily Paralika, and Ms Angélica André, of White & Case LLP, 11, boulevard de la Madeleine, 75001 Paris,

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<sup>1</sup> Claimants' Memorial, pp. 1-2.

<sup>2</sup> Claimants' Memorial, pp. 1-2.

France; and Mr Markiyan Kliuchkovskiy, Mr Serhii Sviriba, and Ms Olena Koltko, of Magisters (subsequently known as Egorov Puginsky Afanasiev & Partners), 38 Volodymyrska St, 01034 Kiev, Ukraine.

## **II. PROCEDURAL HISTORY**

6. By letter dated 3 December 2007, the Claimants submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes ('ICSID'), in which it claimed that ICSID had jurisdiction under the Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, which was signed on 4 March 1994 and entered into force on 16 November 1996 ('the BIT'). By letter dated 15 February 2008, the Claimants submitted an Amended Request for Arbitration to ICSID.
7. On 22 August 2008, the Acting Secretary-General of ICSID registered the Claimants' Request for Arbitration.
8. The Parties then proceeded to constitute the Tribunal. By letter dated 15 September 2008, the Claimants informed ICSID that they had appointed Mr Jan Paulsson, of Swedish and French nationality, as arbitrator in this case. By letter dated 3 December 2008, ICSID confirmed that, in the absence of any agreement of the Parties, the procedure for constituting the Tribunal would be that set forth in Article 37(2)(b) of the ICSID Convention. ICSID then sought the acceptance by Mr Paulsson of his appointment.
9. By letter dated 4 December 2008, ICSID informed the Parties that the Respondent had appointed Professor Donald McRae, of Canadian and New Zealand nationality, as its arbitrator in this case. ICSID also informed the Parties that, in accordance with ICSID Arbitration Rule 5(2), it would proceed to seek Professor McRae's acceptance of his appointment. By letter dated 13 December 2008, ICSID informed the Parties that Professor McRae had accepted his appointment as arbitrator.
10. By letter dated 11 December 2008, ICSID reported that Mr Paulsson had failed to accept his appointment as arbitrator in this case.

11. By letter dated 2 February 2009, the Claimants informed ICSID of their appointment of Mr Gary Born, of US nationality, as their party-appointed arbitrator. By letter dated 3 February 2009, ICSID recalled that, in accordance with ICSID Arbitration Rule 1(3), where the Tribunal is to consist of three members (as is the case here), a national of either the Contracting State party to the dispute (i.e., Ukraine), or the Contracting State whose national is a party to the dispute (i.e., the United States) may not be appointed as arbitrator by a party without the agreement of the other party to the dispute. ICSID informed the parties that, as it understood that Mr Gary Born was a US national, his appointment could not be effective without the agreement of the parties to the dispute, and it invited the Parties to comment by 9 February 2009.
12. By letter dated 6 February 2009, the Respondent indicated that it did not agree to Mr Born's appointment. By letter dated 6 February 2009, ICSID invited the Claimants to appoint a new individual to serve as arbitrator in this case.
13. By letter dated 10 February 2009, the Claimants informed ICSID that they had appointed Professor Philippe Sands QC, of British and French nationality, as their party-appointed arbitrator. By letter dated 11 February 2009, ICSID informed the Parties that it was proceeding to seek Professor Sands' acceptance of his appointment. By letter dated 12 February 2009, ICSID informed the Parties that Professor Sands QC had accepted his appointment.
14. By letter dated 26 March 2009, the Respondent informed ICSID that the Parties had reached agreement on a process for appointing the President of the Tribunal. By letter dated 27 March 2009, ICSID asked the Claimants to confirm this agreement.
15. By letter dated 8 April 2009, the Claimants confirmed that the Parties had agreed to appoint Dr Gavan Griffith QC as President of the Tribunal. By letter also dated 8 April 2009, the Respondent confirmed that the party-appointed arbitrators had confirmed that Dr Griffith QC had accepted his appointment as President of the Tribunal. By letter also dated 8 April 2009, ICSID informed the Parties that it would proceed to seek the acceptance by Dr Griffith QC of his appointment.

16. By letter dated 22 April 2009, the Acting Secretary-General of ICSID, Mr Nassib Ziadé, informed the Parties that all of the arbitrators appointed in the case had accepted their appointments and that, in accordance with ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceeding to have begun on 22 April 2009. Mr Ziadé also informed the Parties that Dr Sergio Puig would serve as the Secretary of the Tribunal.
17. On 29 July 2009, the Tribunal held its First Session at the seat of ICSID in Washington DC. Among other things, it was agreed that the proceeding would be conducted in accordance with the ICSID Arbitration Rules of 2006 and that any issue of quantum be bifurcated from the proceeding on jurisdiction and liability. The Tribunal fixed an alternative timetable in case the Tribunal decided also to bifurcate the merits (liability) from jurisdiction.
18. On 1 December 2009, in accordance with the directions of the Tribunal made at the First Session, as amended by agreement of the Parties, the Claimants filed their Memorial on Jurisdiction and the Merits. Together with their Memorial, the Claimants filed witness statements of Mr Leonid Shapsis, the founder and President of Bosh; Mr Borys Boguslavskyy, the Chief Executive Officer of Bosh Gesellschaft für Wissenstransfer mbH, and President of B&P; Ms Iryna Gulida, the Chief Financial Officer and Vice-President of B&P; Ms Olga Romanchuk, the Chief Accounting Officer of B&P (1993-2006), and subsequently the Chief Executive Officer of B&P (from 2006 onwards); Ms Natalia Gulida, the Manager of the Science-Hotel Complex (2004-2006), and subsequently the Chief Administrator of the Science Hotel Complex (2006-2009); Ms Alina Popova, a senior administrator at the Science-Hotel Complex; and Mr Anatoliy Kaganovich, the former Chief Executive Officer of B&P (1998-2006), who then assumed the position of technical supervisor of B&P.
19. On 18 December 2009, in accordance with the timetable fixed at the First Session (as amended), the Respondent informed the Tribunal that it did not intend to request bifurcation of the proceeding on jurisdiction from the merits, but that it would raise jurisdictional objections in its Counter-Memorial.

20. On 29 April 2010, the Respondent filed its Counter-Memorial. Together with its Counter-Memorial, the Respondent also filed witness statements by Ms Larysa Komarova, the former Deputy Rector of Taras Shevchenko University for Administrative and Commercial Matters; Professor Leonid Huberskyi, the current Rector of Taras Shevchenko University; Mr Vitaliy Kyrylenko, the former Deputy Head of the Education Control Division of the General Control and Revision Office ('CRO') of Ukraine; and an expert report of Professor Volodymyr Luts, Professor of Civil Law at the National Academy of Municipal Management, and Academician of the National Academy of Sciences in Ukraine.
  
21. On 3 August 2010, the Claimants filed their Reply. Together with their Reply, the Claimants filed witness statements by Ms Ljudmyla Atamanchuk, Mr Mychailo Dmytrovych Krekin, and Ms Iryna Synkevych, all of whom were B&P's Ukrainian counsel; as well as witness statements by Ms Ludmila Sokolova, the Chief Architect of the Joint Venture 'MIC Ukraine'; Ms Olga Romanchuk; Ms Iryna Valkova, administrator and member of staff at the Science-Hotel Complex; Ms Svitlana Nikolaeva, former Chief Accountant of B&P; Ms Nataly Gulak, a member of staff at the Science-Hotel Complex; and an expert report of Professor Tai-Heng Cheng, Associate Professor at New York Law School.
  
22. By letter dated 4 August 2010, with the agreement of the Parties, the Tribunal appointed Dr Chester Brown as the Legal Assistant to the Tribunal.
  
23. By letter dated 19 November 2010, ICSID informed the Parties that due to a redistribution in the workload of ICSID, Ms Mercedes Cordido-Freytes de Kurowski was assigned to serve as Secretary of the Tribunal.
  
24. On 15 December 2010, the Respondent filed its Rejoinder. Together with its Rejoinder, the Respondent filed witness statements by Mr Vitaliy Kyrylenko; Ms Irina Salenko, Head of the Division on Support of Legal and Personnel Management, Taras Shevchenko University; and Ms Valentyna Nekrasova, Chief Accountant of Taras Shevchenko University.

25. A substantive hearing was held from 7 – 9 December 2011 at the seat of ICSID, 1818 H Street NW, Washington DC, 20433, United States of America. In attendance at the hearing were, on behalf of the Tribunal: Dr Gavan Griffith QC (President), Professor Philippe Sands QC, and Professor Donald McRae, as well as Ms Mercedes Cordido-Freytes de Kurowski (Tribunal Secretary), and Dr Chester Brown (Legal Assistant to the Tribunal); also present were Mr David Kasdan (Court Reporter), and Mr Yuri Somov, Ms Julia Karpeisky, and Mr Nikoli Sorokin (Interpreters).
26. In attendance on behalf of the Claimants were Dr Todd Weiler (London, Ontario), Mr Michael Woods, Ms Martha Harrison, and Ms Sabrina Bandali (Heenan Blaikie LLP, Toronto and Ottawa), and Mr Bevan Gray and Ms Heather Gray (Students-at-Law); as well as Mr Leonid Shapsis, Mr Boris Boguslavskyy, Ms Olga Romanchuk, Mr Anatolii Kaganovych, Ms Ljudmila Atamanchuk, and Ms Irina Gulida (representatives of the Claimants, and witnesses).
27. Representing the Respondent at the hearing were Mr John Willems, Ms Marily Paralika, and Ms Noor Davies (White & Case LLP, Paris); Mr Markiyany Kliuchkovskyy and Ms Krystyna Khripkova (Magisters, subsequently known as Egorov Puginsky Afanasiev & Partners, Kiev); Mr Denys Demchenko (Ministry of Foreign Affairs of Ukraine); Mr Oleksandr Bilous and Mr Herman Haluschenko (Ministry of Justice of Ukraine); Mr Vitaliy Kyrylenko (CRO) and Mr Valentyna Nekrasova (Taras Shevchenko National University of Kiev) (both witnesses).
28. On 20 April 2012, the Parties filed Post-Hearing Briefs. By letter dated 3 May 2012, the Respondent submitted certain comments on the Claimants' Post-Hearing Brief. By letter dated 4 May 2012, the Tribunal invited the Claimants to submit any response to the Respondent's letter, and also informed the Parties that it did not otherwise require any further submissions or comments. By letter dated 4 May 2012, the Claimants submitted their response to the Respondent's letter.
29. By letter dated 11 May 2012, the Respondent objected to the Claimants' reliance on certain additional legal authorities in their Post-Hearing Brief, arguing that such was inconsistent with the Parties' agreement as expressed in a joint letter to the Tribunal dated 25 August 2011. The Respondent accordingly requested that the Tribunal: (i) direct the

Claimants to indicate which of the legal authorities cited in their Post-Hearing Brief were new, and thereafter strike these new authorities from the record; or (ii) in the alternative, strike all of the legal authorities submitted with the Claimants' Post-Hearing Brief. By letter dated 11 May 2012, the Claimants provided their comments on the Respondent's application. By further letter dated 18 May 2012, the Respondent reiterated its request to the Tribunal.

30. With respect to the Respondent's application, the Tribunal agrees that any new authorities submitted by the Claimants for the first time with their Post-Hearing Brief were submitted late. However, the Tribunal does not consider that this affects its ability in this Award to take judicial notice of, refer to, or rely on, any relevant legal principles or judicial or arbitral decisions in accordance with the principle of *jura novit curia*.<sup>3</sup> The Tribunal also observes that, in any event, the disposition of the Respondent's application has been immaterial to the outcome.

31. On 21 May 2012, the Parties filed their Submissions on Costs.

32. The Tribunal conducted its deliberations in the form of in-person meetings in Washington DC on 9 December 2011 and in London on 28 April 2012, as well as by electronic communication.

### **III. FACTS OF THE DISPUTE**

#### **A. Introduction**

33. This dispute concerns an allegation by the Claimants, Bosh and B&P, that they made an investment in Kiev, the capital city of Ukraine, which consisted of a contract which B&P entered into on 29 January 2003 with the Taras Shevchenko National University of Kiev ('the University') to undertake a two-stage renovation and redevelopment of a property at the address 3 Chervonozorianyi Avenue. This project was to result in the creation of 'a

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<sup>3</sup> See also *RSM Production Corporation v Grenada* (ICSID Case No ARB/05/14), Decision on RSM Production Corporation's Application for a Preliminary Ruling of 7 December 2009, para. 23; see also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, 1987 ed), p. 299.

facility comprising a hotel, a research training centre with conference and meeting rooms, dining facility, a garden and sporting facility’ which would be designed ‘to accommodate academic symposia, seminars and conferences’ (which is referred to as ‘the Project’, ‘the Science-Hotel Complex’, and the ‘Joint Activity’).<sup>4</sup> The Claimants further allege that, through conduct of the CRO, the Ukrainian courts, the Ministry of Justice, and the University – all of whose acts and omissions are attributable to Ukraine – the contract between B&P and the University was terminated, and B&P was subsequently evicted from the Science-Hotel Complex. The Claimants submit that the Respondent has, through the conduct of these entities, breached its obligations under the BIT, and that this has caused the Claimants to suffer loss.

## **B. Establishment of Bosh and B&P in Ukraine**

34. The owner of Bosh, Mr Shapsis, had first established Bosh in 1992 in order to operate a construction firm in Ukraine in order to take advantage of the opportunities that Ukraine’s newly achieved independence from the Soviet Union would provide for business.<sup>5</sup> Mr Shapsis had a background in construction and engineering, having graduated from the Poltava Engineer Construction Institution in Kiev.<sup>6</sup> Mr Shapsis also enlisted the collaboration of Mr Borys Boguslavskyy, who was living in Ukraine and who became the President of B&P.<sup>7</sup>

35. The University was founded in 1833, and was named the ‘Taras Shevchenko National University of Kiev’ in 1929, after a well-known Ukrainian poet and political activist.<sup>8</sup> It is a ‘multidisciplinary education and scientific complex’ and consists of ‘15 faculties and six institutes’, and employs around 2,000 academic staff.<sup>9</sup>

36. B&P had first become involved with the property at 3 Chervonozorianyi Avenue in 1996, when the University had engaged B&P to perform some repairs on the building.<sup>10</sup> After

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<sup>4</sup> Claimants’ Memorial, p. 4.

<sup>5</sup> Shapsis WS, p. 1.

<sup>6</sup> Claimants’ Memorial, p. 2.

<sup>7</sup> Shapsis WS, p. 1; Boguslavskyy WS, pp. 3-4.

<sup>8</sup> Respondent’s Counter-Memorial, para. 23.

<sup>9</sup> *Id.*

<sup>10</sup> Claimants’ Memorial, pp. 3, 5. The Claimants state that: ‘On April 26, 1996, the University and B&P entered into an agreement ... about common activity (relating to the building of a hostel for students without any change of status.’

the completion of this repair work, the City of Kiev decided to upgrade and renovate a city square close to the property at 3 Chervonozorianyi Avenue, and in the context of those works, the City of Kiev and the University discussed the future of the property.<sup>11</sup> At the time, a large part of the property was in a state of disrepair, and was partially occupied by squatters.<sup>12</sup> It was designated as for use as a dormitory for students at the University, but it was used for other purposes due to its inconvenient location for the University.<sup>13</sup> It was decided that a facility should be developed comprising a hotel, research training centre with conference and meeting rooms, dining facility, a garden and sporting facility which would be capable of holding academic symposia, seminars and conferences.<sup>14</sup>

37. The University contacted B&P to enquire as to its interest in undertaking the redevelopment project. The University recognised that it did not have the funds to finance the redevelopment, and that B&P would have to contribute capital and other resources to carry out the redevelopment project, and that in return, B&P would own a 50% share of the project for 25 years.<sup>15</sup>

38. B&P and the University then entered into negotiations, and in the course of these negotiations, B&P had many meetings with the Rector of the University, Mr V Skopenko, and other University officials. The Claimants state that they had to ‘comply with a multitude of legal and bureaucratic requirements to get the Project off the ground’,<sup>16</sup> such as the approval for the project of the Zalaiznichny District State Administration, the zoning of the property, the approval for the project of the Kiev State Administration, and the approval by the University of the design for the Science-Hotel Complex.<sup>17</sup> During the contractual planning process, the net present value of the project was estimated to be between USD 9 – USD 11 million.<sup>18</sup>

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<sup>11</sup> Claimants’ Memorial, p. 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Claimants’ Memorial, pp. 4-5.

<sup>16</sup> Claimants’ Memorial, p. 5.

<sup>17</sup> Claimants’ Memorial, pp. 5-7.

<sup>18</sup> Claimants’ Memorial, p. 8.

### C. The 2003 Contract

39. On 29 January 2003, the University and B&P entered into ‘Contract 07-03-02’ for the redevelopment of the property (‘the 2003 Contract’). The subject of the 2003 Contract was the creation of the joint venture between B&P and the University to redevelop and operate the Science-Hotel Complex. The joint venture was to be an unincorporated joint venture, or a ‘joint activity without the creation of a legal entity partnership’, as it is known in Ukrainian law.<sup>19</sup>

40. In Article 2(1) of the 2003 Contract, the parties agreed the following:

‘The Parties to this Contract shall act jointly for the purpose of creation and operation of a research and hotel complex at 3 Chervonozorianyi Avenue, Kiev, hereinafter referred to as “the Object”. Taking into account the statute tasks of the University and the Company [B&P], the Parties for the purpose of creation and operation of the Object shall be engage [*sic*] in the following activities in accordance with the civil acts of Ukraine:

- Scientific activities;
- Educational activities;
- Organisation of conferences, presentations, meetings, competitions, television space bridges, internet space bridges, etc;
- Information services;
- Cultural and educational events;
- Hotel business with elements of customer services;
- Catering;
- Tourism;
- Sports and entertainment activities;
- Trade activities;
- External economic activities in the aforementioned directions.’<sup>20</sup>

41. In Article 9(1) of the 2003 Contract, the parties recorded their agreement on the services that would be provided by the Joint Activity:

‘Products that are the results of the Joint Activity shall be realised by creation, rendering and realisation of the following services and taking the following measures:

- realisation of joint educational programs;
- creation and modern operation of training centres;
- creation of possibilities of an additional training of the youth [...];
- creation of possibilities for an assistance in research, experimental and design activities in various industries of the national economy;
- [...]
- organisation of events in the field of science, tourism and recreation;

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<sup>19</sup> *Id.*

<sup>20</sup> 2003 Contract, Art 2(1) (Exhibit R-9); referred to in Respondent’s Counter-Memorial, para. 44.

- organisation and conducting of scientific-and-enlightener, educational, cultural and recreational, theatrical and other programs [...];
- organisation and holding of conferences, presentations, meetings, etc;
- organisation of after-sales services;
- performance of advertising and information activities;
- tourist and hotel activities [...];
- creation, operation and rent of premises for offices, presentations, conferences, meetings, etc;
- activities in the sphere of catering, creation of branded shops and cafes and performance of the trade activity;
- rendering services in the sphere of tourism and recreation;
- conducting expert and import transactions.<sup>21</sup>

42. In order to implement the 2003 Contract, the parties agreed that the University would provide the building at 3 Chervonozorianski Avenue, Kiev; that B&P would perform certain renovation and redevelopment works to the building; and that the building would then function as the Science-Hotel Complex.<sup>22</sup> It is relevant to set out salient parts of Article 7, which records the parties' agreement on the 'contributions and shares' of the parties.

43. Article 7(1) provided in part that the University's contribution to the Joint Activity would consist of 'tangible and intangible assets' in the form of:

7.1.1. The right of use of the building at 3 Chervonozorianski Avenue, Kiev, as of 1996 without the right of alienation for the reconstruction purposes. For the purposes of this Contract the right of use the building at 3 Chervonozorianski Avenue, Kiev ("the Object") without the right of alienation after the reconstruction has taken place. The amount of the mentioned contribution according to an expert opinion ... shall be UAH 6,449,000.

7.1.2. The cost for the use of premises were used by the general contracting company [...].

7.1.3. The cost for the use of premises that were used by the construction directorate [...].

7.1.4. Creation of the fixed assets by the performance of the second stage of operations related to the reconstruction of the Object in accordance with the procedure determined by this Contract [...].

7.1.7. The right to use the following items while conducting the joint activity:

- the name of Taras Shevchenko National University of Kiev;
- the right to render the services that the University is entitled to render in accordance with its Statute and the legal instruments;
- the right to use a business reputation of the University. ...<sup>23</sup>

<sup>21</sup> 2003 Contract, Art 9(1) (Exhibit R-9); Respondent's Counter-Memorial, para. 46.

<sup>22</sup> Respondent's Counter-Memorial, para. 47.

<sup>23</sup> 2003 Contract, Art 7.1.1 – 7.1.8 (Exhibit R-9).

44. Article 7(2) further provided that B&P's contribution to the joint activity would consist of 'tangible and intangible assets' in the form of the following:

7.2.1. Creation of the fixed assets of the first group in the form of construction-and-assembling operations of the first stage of reconstruction of the Object in accordance with the [approved] construction documents ... The said assets shall; be transferred to the University balance in accordance with Paragraph 14(1). The right of use the results of the reconstruction (the newly created value) of the Object. The amount of the mentioned contributions shall amount to UAH 6,449,000 in accordance with the expert opinion on the value of an object [*sic*] [...];

7.2.2. The value of the furniture, inventory and process equipment necessary for the functioning of the first stage of the Object reconstruction shall be determined by Annex No. 7 to this Contract;

7.2.3. Creation of fixed assets by the completion of the second stage of reconstruction of the Object in accordance with a procedure to be determined by the terms and conditions of this Contract [...];

7.2.5. Funds, namely a share contribution in the creation of the engineering transport infrastructure of Kiev [...];

7.2.6. Expenses on the maintenance of the building during the reconstruction of the Object [...];

7.2.7. Expenses related to repair work and arrangement of a service media of the premises intended for the allocation of the Directorate and the general contractor's organisation [...];

7.2.8. The Company's total contribution shall be UAH 8,399,590 ... and shall be determined in Consolidated Calculation No. 2 that shall be drawn up by virtue of Annexes Nos. 7 to 12 ... Hereby the Company's contribution shall be equal to 50 (fifty) percent of the joint contribution of the Parties.'<sup>24</sup>

45. Article 11(1) provided that the 2003 Contract would be 'valid from the moment it is signed by the parties until December 31, 2027',<sup>25</sup> meaning that the parties would have the benefit of the Contract for just under 25 years, although the Contract also provided for an early termination procedure in Article 11(3), which is set out below.

46. It is convenient to set out other relevant provisions of the 2003 Contract. Under Article 3(3):

'The joint activity of the Parties shall comply with the provisions of this Contract and shall meet the procedure, terms and conditions determined by this Contract and the current legislation acts that regulate the procedure of engaging into a joint activity.'<sup>26</sup>

47. Article 4(2) provided that:

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<sup>24</sup> 2003 Contract, Art 7.2.1-7.2.8 (Exhibit R-9).

<sup>25</sup> 2003 Contract, Art 11(1) (Exhibit R-9).

<sup>26</sup> 2003 Contract, Art 3(3) (Exhibit R-9).

‘The supreme management body shall be a Meeting of the Parties’ Representatives including the following persons: from the University – Rector of the University or a person authorised by him; from the Company – a person authorised by the Members of the Company who shall act by virtue of a resolution of the Members of the Company. The supreme management body shall be authorised to take decisions in any matters related to the joint activity that are not contrary to the current laws and do not belong to the exclusive competence of the parties’ heads.’<sup>27</sup>

48. Under Article 4(4):

‘The Company shall engage in the joint activity by virtue of a power of attorney which the University shall issue within five days from the moment of signing this Contract.’<sup>28</sup>

49. Article 4(6) required that:

‘Financial transactions related to the joint activity of the Parties shall be conducted by means of the joint activity settlement account which is opened after the registration of this Contract in accordance with the current laws of Ukraine.’<sup>29</sup>

50. Under Article 4(7):

‘The University shall be entitled to control the joint activity under this Contract by the means of examination of the account and other documents of the Company but only in respect to the joint activity.’<sup>30</sup>

51. As the Tribunal has observed above, the 2003 Contract contained an early termination procedure in Article 11(3):

‘The Parties shall be entitled to an early termination of this Contract on the grounds and in accordance with the procedure provided by the current legislation.’<sup>31</sup>

52. Article 11(4) – 11(6) contained a procedure for the allocation of the joint venture’s assets in the event of termination:

‘11(4). In case of termination of this Contract the remaining funds and property shall be distributed among the Parties in proportion to their contributions to the joint property. After the termination of this Contract the building shall remain in the property of the University. The property that is contributed by the Company to the

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<sup>27</sup> 2003 Contract, Art 4(2) (Exhibit R-9).

<sup>28</sup> 2003 Contract, Art 4(4) (Exhibit R-9).

<sup>29</sup> 2003 Contract, Art 4(6) (Exhibit R-9).

<sup>30</sup> 2003 Contract, Art 4(7) (Exhibit R-9).

<sup>31</sup> 2003 Contract, Art 11(3) (Exhibit R-9).

joint activity and can be ringfenced without causing any damage to the building shall remain in the property of the Company.

11(5). In case of termination of this Contract all improvements of the building that result from the reconstruction of the joint activity and cannot be detached without causing damage to the building shall become the property of the University at their residual value. The Company shall be subsequently compensated for the value of the tangible assets that cannot be detached from the building.

11(6). In case of termination of this Contract the contributions and the part of the joint property that can be detached from the building as well as the property rights contributed by the Parties shall be returned to the Parties in accordance with the procedure determined in the current legislation.<sup>32</sup>

53. Article 13(1), entitled 'Disputes Settlement Procedure', provided that:

'All disputes between the Parties in connection to which no agreement has been reached shall be settled in accordance to the Ukrainian legislation.'<sup>33</sup>

54. And Article 15(1) stated that:

'In cases provided for in this Contract the Parties are governed by the current legislation of Ukraine.'<sup>34</sup>

55. As was foreseen in Article 7(2) of the Contract, the Project was to proceed in two phases.

The first phase involved the redevelopment of the first four of the building's five floors (including the construction of living, dining and conference facilities.)<sup>35</sup> The second phase included the construction of additional rooms on the fifth floor, the installation of an elevator, and a renovation of the building's sports facilities and a garden.<sup>36</sup>

56. Construction works at the Science-Hotel Complex proceeded throughout 2003, and the first phase was completed.<sup>37</sup> The commencement of the second phase of the Project was however delayed, which the Claimant alleges was partly due to difficulties encountered in evicting illegal tenants from the building who had been there since 1999.<sup>38</sup>

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<sup>32</sup> 2003 Contract, Art 11(4)-11(6) (Exhibit R-9).

<sup>33</sup> 2003 Contract, Art 13(1) (Exhibit R-9).

<sup>34</sup> 2003 Contract, Art 15(1) (Exhibit R-9).

<sup>35</sup> Claimants' Memorial, p. 9.

<sup>36</sup> Claimants' Memorial, pp. 9-10.

<sup>37</sup> Claimants' Memorial, pp. 8-10.

<sup>38</sup> Claimants' Memorial, p. 10.

57. Despite these delays, the University and B&P agreed on 30 July 2005 that the Science-Hotel Complex would open on 1 August 2005, and begin operations.<sup>39</sup>

#### **D. Internal Audit by the University**

58. In October 2006, the University's Financial and Business Activity Control Department ('Control Department'), responsible for the inspection of the financial activity of the University, commenced an internal audit of the Joint Activity ('Internal Audit').<sup>40</sup> The purpose of the Internal Audit was to ascertain whether B&P was in compliance with the 2003 Contract for the period 2003 – 2006. The University's Control Department issued a report dated 29 December 2006 ('Internal Audit Report'), and found 'a number of irregularities' in B&P's performance of its contractual obligations.<sup>41</sup> These included a finding that B&P was not using the building in accordance with the terms of the 2003 Contract, including that it was not undertaking any 'joint educational activities with the University'.<sup>42</sup>

59. Although B&P had provided documentation to the Control Department to support its claims that the Science-Hotel Complex had hosted conferences, the Respondent has alleged that those conferences only made use of the accommodation facilities, rather than the conference rooms; that many of the organisations which had made use or planned to make use of the conference facilities were private companies, rather than educational institutions.<sup>43</sup> The Respondent has further noted that other events hosted by the Science-Hotel Complex were listed as 'Ukraine, Eurovision', 'Germany. World Football Championship', and 'Italy'.<sup>44</sup> The Control Department accordingly concluded that the Science-Hotel Complex had not hosted seminars, conferences or other university events, of the kind envisaged by the 2003 Contract.<sup>45</sup>

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<sup>39</sup> Claimants' Memorial, p. 8.

<sup>40</sup> Respondent's Counter-Memorial, paras. 59-60.

<sup>41</sup> Respondent's Counter-Memorial, paras. 62-63.

<sup>42</sup> Respondent's Counter-Memorial, para. 66.

<sup>43</sup> Respondent's Counter-Memorial, para. 68.

<sup>44</sup> Respondent's Counter-Memorial, para. 72.

<sup>45</sup> Respondent's Counter-Memorial, paras. 66, 74; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

60. The Control Department also found in the Internal Audit that B&P had failed to open a separate bank account for the Joint Activity in that it had conducted all the financial operations relating to the Joint Activity through one single bank account held by B&P.<sup>46</sup> Further, in the proceedings the Respondent asserted that ‘there were no separate balance sheets and no separate accounting books and ... the Joint Activity’s financial results appeared only on B&P’s balance sheets.’<sup>47</sup>

61. In addition, the Control Department found that the parties to the 2003 Contract had failed to ‘exchange available information ... on aspects of their mutual interests’, to ‘conduct joint meetings, mutual consultations on subjects of mutual activities’, and had also not held any meetings of the parties’ representatives, contrary to Articles 3 and 4 of the 2003 Contract.<sup>48</sup>

62. The Control Department also made findings of other breaches, including that B&P had:

- failed to keep an inventory of the Joint Activity’s assets, in breach of Article 8(2) of the 2003 Contract;<sup>49</sup>
- leased equipment ‘without having assigned inventory numbers on the leased equipment’;<sup>50</sup>
- recruited employees who were not aware that they were employed for the Joint Activity;<sup>51</sup>
- violated Ukrainian tax legislation;<sup>52</sup> and
- made use of the building for purposes not connected with the Joint Activity, including the sub-let of the fifth floor of the building to one of B&P’s contractors.<sup>53</sup>

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<sup>46</sup> Respondent’s Counter-Memorial, paras. 76-77; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

<sup>47</sup> Respondent’s Counter-Memorial, para. 77.

<sup>48</sup> Respondent’s Counter-Memorial, paras. 80-81; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

<sup>49</sup> Respondent’s Counter-Memorial, para. 82; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

<sup>50</sup> Respondent’s Counter-Memorial, para. 83; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

<sup>51</sup> Respondent’s Counter-Memorial, para. 84; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

<sup>52</sup> Respondent’s Counter-Memorial, paras. 85-86; see also Internal Audit Report of 29 December 2006 (Exhibit R-23).

<sup>53</sup> Respondent’s Counter-Memorial, paras. 87-90.

63. On the basis of these irregularities, the University Control Department concluded in the Internal Audit Report that B&P owed the University UAH 124,036.60.<sup>54</sup>

#### **E. Audit of the University by the General Control and Revision Office**

64. During November and December 2006, the General Control and Revision Office of the Ukraine Ministry of Finance ('CRO') carried out an audit of the University ('CRO Audit'), that included a 'Cross-Revision' of the Joint Activity ('Cross-Revision'), comprised of an inspection of B&P's documents relating to the Joint Activity'.<sup>55</sup>

65. In the proceedings, the Respondent describes the CRO as an 'independent financial control authority within the Ministry of Finance of Ukraine',<sup>56</sup> and its purpose is to ensure that 'the entities, institutions and organisations that receive state funding comply with the requirements of the laws of Ukraine regarding the use and accounting of budget funds and the use of state property'.<sup>57</sup>

66. According to the Respondent, in the course of its audit, the CRO decided that it was 'necessary to extend their inspection to the Joint Activity between the University and B&P', and proceeded to review records held by B&P relating to the Joint Activity ('the Cross-Revision').<sup>58</sup>

67. B&P claimed that it was not aware of the CRO Audit until it received the CRO's request for the production of copies of all documents relating to the Joint Activity.<sup>59</sup> In response, the Respondent explained that 'the CRO was not obliged to notify B&P of the scheduled audit', which is 'not provided for in the applicable regulations'.<sup>60</sup>

68. The CRO's inspection of B&P's documents took place from 8 to 15 December 2006.<sup>61</sup>

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<sup>54</sup> Respondent's Counter-Memorial, para. 91.

<sup>55</sup> Respondent's Counter-Memorial, para. 92.

<sup>56</sup> Respondent's Counter-Memorial, para. 94.

<sup>57</sup> *Id.*

<sup>58</sup> Respondent's Counter-Memorial, para. 101.

<sup>59</sup> Claimants' Memorial, p. 12.

<sup>60</sup> Respondent's Counter-Memorial, para. 100.

<sup>61</sup> Respondent's Counter-Memorial, para. 102.

69. In addition to its review of documents, the CRO requested that the University prepare a report on the physical measurements of the building.<sup>62</sup> This report stated that much of the building consisted of hotel rooms and commercial premises, and also that two families were living in the building.<sup>63</sup>

70. The report led the University's then Deputy-Rector to conclude that the building was being used mainly for commercial, rather than educational, purposes.<sup>64</sup>

71. On 15 December 2006, the CRO issued the Cross-Revision Report with the finding that B&P had failed to open a separate joint activity account, contrary to Article 4.6 of the 2003 Contract:

'the Company did not open a joint activity account. All business operations of the Company, including the joint activity, were carried out on the account current No 260083012307, MFO 300012, with the Main Operations Department of Prominvestbank in Kiev.'<sup>65</sup>

72. The CRO also found that B&P had failed to conduct the activities which it was required to carry out under the 2003 Agreement:

'Documents evidencing the joint activity of the University and the Company in the areas identified in [the 2003 Contract] ... *inter alia*, scientific activity, education activity, conferences, presentations, meetings, competitions, video- and inter-bridges; information services; cultural and educational activities, foreign trade activities in the selected areas, were not provided for collation.'<sup>66</sup>

73. B&P protested these findings and its Chief Executive Officer, Ms Olga Romanchuk, counter-signed the Cross-Revision Report under protest, stating that she disagreed with the conclusions.<sup>67</sup> B&P also sent letters of complaint to the CRO, the Ministry of Finance and the State Prosecutor's Office, but only received a *pro forma* reply from the Ministry of Finance.<sup>68</sup>

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<sup>62</sup> Respondent's Counter-Memorial, para. 103.

<sup>63</sup> Respondent's Counter-Memorial, paras. 105-109.

<sup>64</sup> *Id.*

<sup>65</sup> Respondent's Counter-Memorial, paras. 112-118; see also Cross-Revision Report of 15 December 2006 (Exhibit R-22), p. 5; and Claimants' Memorial, p. 12.

<sup>66</sup> Respondent's Counter-Memorial, paras. 119-121; see also Cross-Revision Report of 15 December 2006 (Exhibit R-22), p. 5; and Claimants' Memorial, p. 12.

<sup>67</sup> Claimants' Memorial, p. 13.

<sup>68</sup> *Id.*

74. The CRO issued its Audit Report ('the CRO Audit Report') on the University on 29 December 2006, in which it essentially adopted the findings made in the Cross-Revision Report, including those concerning B&P's failure to open a separate joint activity account and B&P's failure to carry out joint activities in a number of areas.<sup>69</sup>

75. On 10 May 2007, the CRO wrote to the University and confirmed that it had, in the course of the Audit, detected various instances of non-conformity with applicable Ukrainian law, and made 15 recommendations to the University which dealt with a range of issues, and which were expressed in mandatory terms.<sup>70</sup> One of the breaches identified by the CRO was B&P's operation of the Science-Hotel Complex. In the letter dated 10 May 2007, the CRO directed the University to do *inter alia* the following:

'The University shall:

1. Take effective measures to eliminate completely the established inconsistencies and to bring the guilty officials to responsibility with respect to these breaches.

[...]

5. Consider the question of termination of joint activities with B&P, LTD as such as inconsistent with the University status being a [State] budget-maintained institution as well as return the assets to the above-mentioned company. Prevent violations of effective legislature by the University concerning the use of its assets (State property).<sup>71</sup>

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<sup>69</sup> Respondent's Counter-Memorial, paras. 123-128; CRO Audit Report of 29 December 2006 (Exhibit R-26).

<sup>70</sup> Claimants' Memorial, p. 11.

<sup>71</sup> Letter dated 10 May 2007 from the CRO to the University (Exhibit R-30); see also Claimants' Memorial, pp. 11-12; Respondent's Counter-Memorial, para. 130. The Claimants had submitted a non-certified translation (Exhibit C-51-1), which translated this passage slightly differently: 'The University shall comply with these: (1) Take effective measures to eliminate completely the established inconsistencies and to bring the guilty officials to accountability with respect to these breaches. [...] 5. The question of cessation of the B and P Ltd activities as such inconsistent with the University status being a sate [*sic*] budget-maintained institution, as well as provision of the return of assets allowed for use by the said company. No instance of the breach of effective legislature on the University's part concerning the use of its assets (State property) shall be allowed to take place.' The Claimants subsequently presented a certified translation at the start of the oral hearing, which rendered the passage as follows: 'The University shall: (1) Take effective measures to fully rectify the violations discovered and bring the guilty officials to justice. [...] (5) Consider terminating joint activities with B&P LTD as failing to conform with the University's status as a State-funded institution as well as ensuring return of assets transferred to said company. The University must not be allowed to violate the provisions of current law regarding the use of its assets (State property)': reproduced in Claimants' Post-Hearing Brief, para. 103, fn. 120. The Tribunal does not consider that anything turns on which translation is to be preferred, but it sets out the competing translations for the sake of completeness.

## F. Termination of the 2003 Contract

76. As to rights to termination, the Respondent's submissions were that Ukrainian law provides that where there is a material breach of contract, there are two methods to seek termination of that contract, namely:

'(1) the parties can mutually agree on the termination of the contract; or (2) if the parties cannot agree on such termination, the interested party may request termination of the contract before the Ukrainian courts. However, one party cannot unilaterally terminate a contract, even in case of a material breach.'<sup>72</sup>

77. By letter dated 13 September 2007, the University requested that B&P agree to the termination of the 2003 Contract by reason of the various breaches by B&P identified by the CRO. In that letter, the University also stated that unless B&P agreed to the termination of the 2003 Contract it would be obliged to commence action before the Kiev Commercial Court.<sup>73</sup> By letter dated 21 September 2007, B&P refused the University's request and asserted that any disputes should be settled despite provisions of the BIT.<sup>74</sup> In a further letter dated 1 October 2007, B&P proposed a meeting on 17 October 2007 to discuss the issue. B&P claims that its representatives attended the office of the Rector for that meeting, but the Rector was not available to meet with them.<sup>75</sup>

78. On 2 October 2007, the University initiated proceedings in the Kiev Commercial Court by filing statement of claim No 03-101, in which it sought the termination of the 2003 Contract and the transfer of B&P's 50% interest in the joint venture to the University.<sup>76</sup> Each party made submissions to the Court.

79. B&P contended that as the dispute was an investment dispute within the meaning of the BIT and the ICSID Convention, it was invoking the jurisdiction of ICSID, and it argued that ICSID's jurisdiction was exclusive of the Ukrainian courts. In Ruling 05-6-6/1061 of 29 October 2007, Judge Kovtun agreed that the Kiev Commercial Court lacked

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<sup>72</sup> Respondent's Counter-Memorial, para. 131 (footnote omitted).

<sup>73</sup> Respondent's Counter-Memorial, paras. 134-137; Letter dated 13 September 2007 from the University to B&P (Exhibit R-31).

<sup>74</sup> Respondent's Counter-Memorial, para. 138; Letter dated 21 September 2007 from B&P to the University (Exhibit R-32).

<sup>75</sup> Claimants' Memorial, pp. 13-14.

<sup>76</sup> Respondent's Counter-Memorial, para. 142; see also the University's Statement of Claim No 03-101 of 2 October 2007 (Exhibit R-33).

jurisdiction to determine the case because it fell within the jurisdiction of ICSID. He therefore did not accept the University's claim.<sup>77</sup>

80. On 2 November 2007, the University commenced new proceedings in the Kiev Commercial Court, requesting the same relief.<sup>78</sup> The University filed the same statement of claim as it had filed in the proceedings it had initiated on 2 October 2007.<sup>79</sup>

81. On 8 November 2007, B&P filed its objections to the Kiev Commercial Court, referring to Ruling 05-6-6/1061 of Judge Kovtun. Nevertheless, on 23 November 2007, Judge Khrypun issued a Ruling in Case No 32/619, in which he accepted the statement of claim and invited B&P to submit a substantive response, and also scheduled a hearing for 3 December 2007.<sup>80</sup> B&P did not attend that hearing because – as Ms Romanchuk explained in her witness statement – it considered that the hearing was 'illegal' and constituted a violation of B&P's 'procedural rights'.<sup>81</sup> On 15 January 2008, B&P filed a written submission in which it objected to Judge Khrypun's Ruling of 23 November 2007 on jurisdictional grounds only, and it did not address the University's claim on the merits of terminating the 2003 Contract.<sup>82</sup>

82. On 16 January 2008, Judge Khrypun issued a judgment which terminated the 2003 Contract.<sup>83</sup> Judge Khrypun rejected B&P's submission that the BIT was applicable to the dispute between the parties, and concluded that the 2003 Contract was 'commercial'. It followed that he found that the dispute was subject to the jurisdiction of the Ukrainian courts, holding that: 'According to the Article 12 of the Code of Commercial Procedure of Ukraine, all the disputes arising upon amendment and termination of commercial contracts belong to the jurisdiction of commercial courts.'<sup>84</sup> On the merits issues, Judge

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<sup>77</sup> Claimants' Memorial, pp. 14-15; Respondent's Counter-Memorial, paras. 144-145; see also Kiev Commercial Court, Ruling No 05-6-6/1061 on Refusal to Accept the Statement of Claim (29 October 2007) (Exhibit RLA-115).

<sup>78</sup> Respondent's Counter-Memorial, paras. 146-155; see also the University's Statement of Claim No 03-101 of 2 October 2007 (Exhibit R-35).

<sup>79</sup> Claimants' Memorial, p. 15; Claimants' Post-Hearing Brief, paras. 201-203; see also the University's Statement of Claim No 03-101 of 2 October 2007 (Exhibit R-35).

<sup>80</sup> Respondent's Counter-Memorial, para. 148; see also Kiev Commercial Court (Case No 32/619), Ruling on Institution of the Proceedings of 23 November 2007 (Exhibit RLA-116).

<sup>81</sup> Romanchuk WS, p. 9; see also Respondent's Counter-Memorial, para. 149.

<sup>82</sup> Respondent's Counter-Memorial, para. 150.

<sup>83</sup> Kiev Commercial Court (Case No 32/619), Judgment of 16 January 2008 (Exhibit RLA-118).

<sup>84</sup> Kiev Commercial Court (Case No 32/619), Judgment of 16 January 2008 (Exhibit RLA-118), p. 3; Respondent's Counter-Memorial, para. 151.

Khrypun held that the B&P's acts and omissions amounted to a material breach of the 2003 Contract, which justified its termination by the Court.<sup>85</sup>

83. On 22 January 2008, B&P sought to appeal the judgment in Case No 32/619. Its appeal was rejected in the first instance by the Kiev Commercial Court of Appeal due to B&P's failure to pay the appropriate court fee.<sup>86</sup> B&P then refiled its appeal with the relevant court fee, which was accepted by the Kiev Commercial Court of Appeal.<sup>87</sup> On the Appeal itself, B&P argued that the Kiev Commercial Court of Appeal should overturn the decision of Judge Khrypun due to: (1) the inconsistent decision in Ruling No 05-6-6/1061; and (2) its submission that the dispute fell to be determined under the BIT and not by the Ukrainian courts.

84. On 3 June 2008, the Kiev Commercial Court of Appeal dismissed B&P's appeal and upheld the judgment in Case No 32/619.<sup>88</sup> As to ground (1), it rejected B&P's argument, based on Article 80 of the Commercial Code of Procedure of Ukraine, that a commercial court should discontinue a proceeding if a decision has already been issued in the same case, which involves the same parties,<sup>89</sup> and found that Article 80 of the Commercial Code of Procedure was only engaged where a court issues a 'judgment', which considers the merits of the dispute, but does not apply where a court issues a 'ruling' (as Judge Kovtun had done), which does not examine the merits.<sup>90</sup> As to ground (2), it also rejected B&P's argument that the dispute was within the jurisdiction of ICSID, including on the bases that the 2003 Contract had not been registered as a foreign investment agreement, that the 2003 Contract itself provided in Article 13(1) that disputes were to be settled by the Ukrainian courts, that Article 12 of the Commercial Code of Procedure of Ukraine provides that disputes concerning the termination of commercial agreements are subject to the jurisdiction of the Ukrainian commercial courts, and that B&P had, in any event, failed to provide any evidence that B&P and the University had entered into a written

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<sup>85</sup> Kiev Commercial Court (Case No 32/619), Judgment of 16 January 2008 (Exhibit RLA-118), p. 4; Respondent's Counter-Memorial, para. 152.

<sup>86</sup> Kiev Commercial Court of Appeal (Case No 32/619), Ruling of 4 March 2008 (Exhibit RLA-119); Respondent's Counter-Memorial, para. 156.

<sup>87</sup> Kiev Commercial Court of Appeal (Case No 32/619), Ruling of 8 April 2008 (Exhibit RLA-120); Respondent's Counter-Memorial, para. 157.

<sup>88</sup> Kiev Commercial Court of Appeal (Case No 32/619), Resolution of 3 June 2008 (Exhibit RLA-121); Respondent's Counter-Memorial, para. 158.

<sup>89</sup> Respondent's Counter-Memorial, para. 159.

<sup>90</sup> Kiev Commercial Court of Appeal (Case No 32/619), Resolution of 3 June 2008 (Exhibit RLA-121), p. 2; Respondent's Counter-Memorial, para. 159.

agreement to submit their dispute to ICSID, as is required by Article 25 of the ICSID Convention.<sup>91</sup>

85. Thereafter, B&P launched a further appeal to the High Commercial Court of Ukraine.<sup>92</sup>

A hearing, attended by B&P's legal representatives, was held on 9 September 2008. B&P maintained its contentions that the Kiev Commercial Court's judgment could not be upheld, because the dispute was subject to the dispute resolution procedures in the BIT; and it also repeated its submission that the matter had already been determined by Judge Kovtun's Ruling in Case No 05-6-6/1061.

86. On 19 September 2008, the High Commercial Court of Ukraine rejected B&P's arguments and upheld the judgment of the Kiev Commercial Court of Appeal.<sup>93</sup>

#### **G. B&P's Eviction from the Science-Hotel Complex**

87. On 28 March 2008, the University instituted a third set of proceedings before the Kiev Commercial Court and filed a statement of claim, requesting that the Court order B&P's eviction from the Science-Hotel Complex.<sup>94</sup> The University argued that as the Kiev Commercial Court had ordered the termination of the 2003 Contract B&P 'no longer had the right to continue to use the premises.'<sup>95</sup> B&P filed a statement of defence on 18 April 2008 and, after the hearing which took place on 21 April 2008, further statements of defence on 6 June 2008 and 9 June 2008.<sup>96</sup>

88. B&P again objected to the University's statement of claim on the two grounds noted above, namely that the dispute was an investment dispute under the BIT and therefore outside the Ukrainian courts' jurisdiction, and that the Kiev Commercial Court's order that the 2003 Contract be terminated was inconsistent with Ruling No 05-6-6/1061 of 29

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<sup>91</sup> Kiev Commercial Court of Appeal (Case No 32/619), Resolution of 3 June 2008 (Exhibit RLA-121), p. 2; Respondent's Counter-Memorial, para. 160.

<sup>92</sup> Respondent's Counter-Memorial, para. 163.

<sup>93</sup> High Commercial Court of Ukraine (Case No 32/619), Ruling for Procedural Decisions of 19 September 2008 (Exhibit RLA-124); Respondent's Counter-Memorial, para. 164.

<sup>94</sup> University's Statement of Claim dated 28 March 2008 (Case No 21/36) (Exhibit R-39); see also Claimants' Memorial, p. 16; Respondent's Counter-Memorial, para. 173.

<sup>95</sup> Respondent's Counter-Memorial, para. 173.

<sup>96</sup> B&P's Statements of Defence (Case No 21/36) of 21 April 2008 (Exhibit R-40), 6 June 2008 (Exhibit R-42), and 9 June 2008 (Exhibit R-43); Respondent's Counter-Memorial, paras. 174-176.

October 2007.<sup>97</sup> In its statement of defence of 6 June 2008, B&P also informed the Kiev Commercial Court that it had filed an application against Ukraine before the European Court of Human Rights.<sup>98</sup>

89. On 10 June 2008, the Kiev Commercial Court held that (as upheld by the Kiev Commercial Court of Appeal on 3 June 2008) the 2003 Contract had been validly terminated by the Court's judgment of 16 January 2008, and that B&P no longer had the right to use the building.<sup>99</sup> It ordered that B&P be evicted from the Science-Hotel Complex and ordered that the Complex be transferred to the possession of the University.<sup>100</sup>

90. B&P appealed the judgment of the Kiev Commercial Court, but did not appear at the hearing. On 11 December 2008, the Kiev Commercial Court of Appeal dismissed B&P's appeal.<sup>101</sup>

91. B&P then appealed that decision to the High Commercial Court of Ukraine.<sup>102</sup> On 2 April 2009, the High Commercial Court of Ukraine dismissed B&P's appeal and upheld the judgment of the Kiev Commercial Court of Appeal.<sup>103</sup>

92. In the meantime, on 13 January 2009, the Kiev Commercial Court had issued an order for the eviction of B&P from the Science-Hotel Complex, and the University had requested that the State Enforcement Office of Ukraine execute that order.<sup>104</sup> The State Enforcement Office wrote to B&P on 14 January 2009, requiring that it leave the Science-Hotel Complex by midday on 16 January 2009.<sup>105</sup> B&P failed to vacate the building by this deadline, and on the afternoon of 16 January 2009, representatives of the

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<sup>97</sup> Respondent's Counter-Memorial, paras. 174-176.

<sup>98</sup> Respondent's Counter-Memorial, para. 175.

<sup>99</sup> Kiev Commercial Court (Case No 21/36), Judgment of 10 June 2008 (Exhibit RLA-122); Respondent's Counter-Memorial, paras. 179-180.

<sup>100</sup> Kiev Commercial Court (Case No 21/36), Judgment of 10 June 2008), referred to in Respondent's Counter-Memorial, paras. 177-182.

<sup>101</sup> Kiev Commercial Court of Appeal (Case No 21/36), Resolution of 11 December 2008 (Exhibit RLA-128), referred to in Respondent's Counter-Memorial, para. 187.

<sup>102</sup> Claimants' Memorial, p. 17; Respondent's Counter-Memorial, para. 189.

<sup>103</sup> High Commercial Court of Ukraine (Case No 21/36), Ruling for Procedural Decisions (Exhibit RLA-130); Respondent's Counter-Memorial, paras. 189-192.

<sup>104</sup> Kiev Commercial Court (Case No 21/36), Ruling of 13 January 2009; Respondent's Counter-Memorial, para. 193.

<sup>105</sup> Respondent's Counter-Memorial, para. 194.

University and the State Enforcement Office presented themselves at the Science-Hotel Complex, but were told by B&P's employees that there were no representatives of B&P in the building, so no eviction could take place. By application on 16 January 2009, the University sought a clarification of the Kiev Commercial Court's Ruling of 13 January 2009, and on 19 January 2009, the Kiev Commercial Court ordered that 'B&P shall be evicted from the non-residential premises at 3, Chervonozorianyi Avenue, Kiev, by means of it being emptied of any persons and property.'<sup>106</sup> Over the course of the period 19-20 January 2009, representatives of the University and State Enforcement Office physically and forcibly carried out the eviction of B&P and its representatives from the premises.<sup>107</sup>

93. B&P subsequently challenged the State Enforcement Office's eviction order before the Kiev Commercial Court. That Court dismissed the challenge on 2 June 2009, and the Kiev Commercial Court of Appeal rejected B&P's appeal from that decision on 4 September 2009.<sup>108</sup>

## **H. Proceedings Regarding the Power of Attorney**

94. In a final set of court proceedings in the Ukraine, on 10 June 2008, the Kiev Commercial Court registered a claim by B&P in which it complained that the University had revoked the power of attorney it had previously granted to B&P in order for B&P to be able to carry out joint activities concerning the Science-Hotel Complex.<sup>109</sup> The Kiev Commercial Court issued a decision on 4 November 2008 in which it rejected B&P's claim, on the grounds that the 2003 Contract had been validly terminated as of the Kiev Commercial Court of Appeal's decision of 3 June 2008.<sup>110</sup>

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<sup>106</sup> Kiev Commercial Court (Case No 21/36), Ruling of 19 January 2009; referred to in Respondent's Counter-Memorial, para. 197.

<sup>107</sup> See e.g., Romanchuk WS, pp. 15-16; Iryna Gulida WS, pp. 23-25; Natalia Gulida WS, pp. 4-5; Popova WS, p. 3; Kaganovich WS, pp. 5-6; Transcript Day 2, p. 424, line 8 – p. 435, line 12 (Mr Kaganovich); see also Respondent's Counter-Memorial, para. 198.

<sup>108</sup> Kiev Commercial Court (Case No 21/36), Ruling of 2 June 2009 (Exhibit RLA-131); Kiev Commercial Court of Appeal (Case No 21/36), Resolution of 4 September 2009 (Exhibit RLA-132); Respondent's Counter-Memorial, para. 200.

<sup>109</sup> Kiev Commercial Court (Case No 21/81), Ruling of 10 June 2008 (Exhibit RLA-123); Respondent's Counter-Memorial, paras. 202-205.

<sup>110</sup> Kiev Commercial Court (Case No 21/81), Judgment of 4 November 2008 (Exhibit RLA-125), p. 2; Respondent's Counter-Memorial, para. 204.

95. B&P appealed this decision to the Kiev Commercial Court of Appeal, but it upheld the decision at first instance.<sup>111</sup>

## **I. Commencement of ICSID Arbitration**

96. As noted above, on 3 December 2007, the Claimants filed its Request for Arbitration with ICSID, and on 21 August 2008, ICSID registered the Request for Arbitration under Article 36(3) of the ICSID Convention.

97. It is not an unusual development in adjudication proceedings for the claims of the parties to evolve as the proceedings move on. As the Claimants' case has undergone substantial refinement during the course of this arbitration, the Tribunal takes the Claimants' final claims for determination as those which were presented at the substantive hearing and maintained in the Claimants' Post-Hearing Brief.

98. As reformulated, the Claimants requested that the Tribunal make the findings that:

1. the Tribunal has jurisdiction over the dispute;<sup>112</sup>
2. the Respondent is responsible for the conduct of the CRO, the Ukrainian courts, the Ministry of Justice, and the University;<sup>113</sup>
3. the Respondent has breached its obligations under the BIT in 'four material ways':
  - a. the manner in which the CRO 'conducted its audit and enforced its conclusions' was contrary to Articles II(3)(a) and III of the BIT;
  - b. the manner in which 'University officials failed to act in good faith towards B&P' by 'seeking to terminate the Agreement rather than working with B&P to improve its implementation' was contrary to Article II(3)(a) of the BIT;
  - c. the manner in which 'University officials committed a fundamental breach of the Agreement, contrary to Ukrainian municipal law' and contrary to the Respondent's obligations under Article II(3)(c) of the BIT; and

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<sup>111</sup> Kiev Commercial Court (Case No 21/81), Resolution of 11 December 2008 (Exhibit RLA-127), p. 5; Respondent's Counter-Memorial, para. 204.

<sup>112</sup> Claimants' Post-Hearing Brief, paras. 12-18, 69-85.

<sup>113</sup> Claimants' Post-Hearing Brief, paras. 19-68.

- d. the manner in which ‘the Ukrainian courts failed to act consistently with the *res judicata* principle’ was contrary to Article II(3)(a) of the BIT.<sup>114</sup>

99. In their Post-Hearing Brief the Claimants confirmed their withdrawal of their claims ‘with respect to the “full protection and security” standard contained in BIT Article II(3)(a) and the “arbitrary or discriminatory measures” standard contained in BIT Article II(3)(b).’<sup>115</sup>

100. The Respondent’s defence also evolved in response to the Claimants’ claims. In its Post-Hearing Brief, the Respondent requested that the Tribunal make the following findings:

1. the conduct of the University is not attributable to Ukraine;<sup>116</sup>
2. the CRO did not interfere with the Claimants’ investment in breach of Article II(3)(a) of the BIT;<sup>117</sup>
3. the Ukrainian court proceedings were fair and transparent, and did not amount to a breach of Article II(3)(a) of the BIT;<sup>118</sup>
4. the Respondent did not frustrate any legitimate expectations of the Claimants in breach of Article II(3)(a) of the BIT;<sup>119</sup>
5. the Claimants’ claims under Article II(3)(c) (the ‘umbrella clause’) should be rejected;<sup>120</sup> and
6. the Respondent did not expropriate the Claimants’ contractual rights contrary to Article III of the BIT.<sup>121</sup>

#### **IV. RELEVANT PROVISIONS OF THE BIT AND APPLICABLE LAW**

##### **A. Relevant Provisions of the BIT**

101. It is convenient to set out certain relevant provisions of the BIT.

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<sup>114</sup> Claimants’ Post-Hearing Brief, para. 86.

<sup>115</sup> Claimants’ Post-Hearing Brief, para. 100.

<sup>116</sup> Respondent’s Post-Hearing Brief, paras. 9-27.

<sup>117</sup> Respondent’s Post-Hearing Brief, paras. 28-64.

<sup>118</sup> Respondent’s Post-Hearing Brief, paras. 65-129.

<sup>119</sup> Respondent’s Post-Hearing Brief, paras. 130-148.

<sup>120</sup> Respondent’s Post-Hearing Brief, paras. 149-184.

<sup>121</sup> Respondent’s Post-Hearing Brief, paras. 185-196.

102. Article I(1)(a) contains the definition of ‘investment’, which provides that:

‘(a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

- (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) intellectual property which includes, inter alia, rights relating to:
  - literary and artistic works, including sound recordings,
  - inventions in all fields of human endeavour,
  - industrial designs,
  - semiconductor mask works,
  - trade secrets, know-how, and confidential business information, and
  - trademarks, service marks, and trade names; and
- (v) any right conferred by law or contract, and any licenses and permits pursuant to law.’

103. Article I(1)(b) provides the definition of ‘company’ as follows:

‘(b) “company” of a Party means any kind of corporation, company, association, partnership, or other organisation, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organised for pecuniary gain, or privately or governmentally owned or controlled’.

104. Article I(1)(f) contains the definition of ‘State enterprise’:

‘(f) “State enterprise” means an enterprise owned, or controlled through ownership interests, by a Party.’

105. Article II(2)(b) also deals with State enterprises, and states that:

‘(b) Each Party shall ensure that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party’s obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.’

106. Article II(3)(a) provides for the obligation on the Contracting Parties to accord fair and equitable treatment and full protection and security, as follows:

‘(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.’

107. The umbrella clause is contained in Article II(3)(c) of the BIT:

‘Each Party shall observe any obligation it may have entered into with regard to investments.’

108. Article III contains the BIT’s protection against expropriation, and provides in part as follows:

‘(1) Investments shall not be expropriated or nationalised either directly or indirectly through measures tantamount to expropriation or nationalisation (“expropriation”) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realisable; and be freely transferable.’

109. Article VI contains the BIT’s investor-State dispute settlement procedure. This provides in part that:

‘(1) For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorisation granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

(2) In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- (c) in accordance with the terms of paragraph 3.

(3)(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to

consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID Convention”), provided that the Party is a party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

(4) Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. ...

[...]

(8) For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.’

## **B. Applicable Law**

110. It is also appropriate to consider the question of applicable law. The Claimants’ claims are presented under Article VI(3)(a)(i) of the BIT, which includes a reference to the ICSID Convention. Article 42(1) of the ICSID Convention provides that:

‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’

### *1. Position of the Claimants*

111. The Tribunal understands the Claimants’ position to be that the law principally governing the Claimants’ substantive investor protections is the BIT.<sup>122</sup> The expert report of Professor Cheng, submitted in support of the Claimants’ claims, acknowledges the provisions of Article 42(1) of the ICSID Convention, but asserts that both the Claimants

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<sup>122</sup> See, e.g., Cheng ER, p. 15.

and Ukraine ‘agree that this dispute is brought under [the BIT], to which Ukraine is a signatory. The Parties have thus agreed that the applicable rules of law are contained in the [BIT], satisfying Article 42(1) of the ICSID Convention.’<sup>123</sup>

## 2. *Position of the Respondent*

112. For its part, the Respondent does not agree that the BIT constitutes an agreement as to the applicable law within the meaning of Article 42(1) of the ICSID Convention. It submits that that the BIT ‘does not contain a provision as to the applicable law’, which means that, following Article 42(1) of the ICSID Convention, the Tribunal may have reference to the BIT, general principles of international law, and Ukrainian domestic law.<sup>124</sup>

## 3. *Determination of the Tribunal*

113. The Tribunal observes that the Claimants’ claims are expressed by reference to the substantive standards of protection in the BIT, and that the Respondent has defended those claims on this basis. In this respect, the Tribunal considers that the applicable law consists, for the most part, of the BIT, as interpreted in accordance with international law. However, the Tribunal agrees with the Respondent that, in addition to applying the provisions of the BIT, it will have to consider Ukrainian law, in particular as the Claimants’ claims are at least in part based on asserted contractual rights. In this respect, the Tribunal agrees with the view expressed by the ICSID tribunal in *Asian Agricultural Products v Sri Lanka*, which held that:

‘[I]t should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantial material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.’<sup>125</sup>

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<sup>123</sup> Cheng ER, pp. 15-17.

<sup>124</sup> Respondent’s Counter-Memorial, paras. 337-338.

<sup>125</sup> *Asian Agricultural Products Ltd v Sri Lanka* (ICSID Case No ARB/87/3), Award of 27 June 1990, para. 21; cited in Respondent’s Counter-Memorial, para. 339.

## **V. JURISDICTION AND ADMISSIBILITY**

### **A. Jurisdiction of the Tribunal over the Claimants' Claims**

#### *1. Position of the Claimants*

114. The Claimants assert that they are 'companies of a Party' (namely, the United States) which have an 'investment' in Ukraine that falls within the scope of protection of the BIT. They argue that 'Bosh is an enterprise incorporated under the laws of New Jersey', and that 'B&P, although incorporated under the law of Ukraine is, according to Article VI(8) of the Treaty, to be treated as a national of the other Contracting Party.'<sup>126</sup>

115. Article I(1)(b) of the BIT defines 'company' of a Party as meaning:

'any kind of corporation, company, association, partnership, or other organisation, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organised for pecuniary gain, or privately or governmentally owned or controlled.'<sup>127</sup>

116. The Claimants submit that Bosh is incorporated in New Jersey and, as such, qualifies as a 'company' of the United States.

117. As for the standing of B&P to present claims under the BIT, Article VI(8) of the BIT provides, in part, that:

'any company legally constituted under the applicable laws and regulations of a Party or political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.'<sup>128</sup>

118. Also relevant to this provision is the definition of 'investment' in Article I(1)(a) of the BIT. This provides in part that the term 'investment' means:

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<sup>126</sup> Claimants' Memorial, p. 18.

<sup>127</sup> BIT, Art I(1)(b).

<sup>128</sup> BIT, Art VI(8).

‘every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and services and investment contracts; and includes: ... (b) a company or shares of stock or other interests in a company or interest in the assets thereof.’<sup>129</sup>

119. As B&P is incorporated under the laws of Ukraine, and because 94.5% of its shares in are owned by Bosh, the Claimants submit that B&P constitutes an ‘investment’ of Bosh, and therefore is to be treated as a company of the United States under Article VI(8).<sup>130</sup>

120. The Claimants also assert that they have an ‘investment’ in Ukraine within the meaning of the BIT, and which also satisfies the requirement under the ICSID Convention that the dispute arise directly out of an ‘investment’.<sup>131</sup>

121. ‘Investment’ is defined in Article I(1)(a) of the BIT in part as meaning:

‘every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts, and includes:

- (i) tangible and intangible property, including rights, such as mortgages, lines and pledges;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having an economic value, and associated with an investment;
- (iv) intellectual property which includes, inter alia, rights relating to:
  - literary and artistic works, including sound recordings,
  - inventions in all fields of human endeavour,
  - industrial designs,
  - semiconductor mask works,
  - trade secrets, know-how, and confidential business information,
  - and
  - trademarks, service marks, and trade names; and
- (v) any right conferred by law or contract, and any licences and permits pursuant to law.’<sup>132</sup>

122. The Claimants argue that their ‘investment’ included:

‘(i) the value of Bosh’s shareholdings in B&P ...; (ii) the rights conferred by the Contract and its value; (iii) [a] claim to performance having an economic value; (iv) goodwill and the technical processes and know-how made available to the Project

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<sup>129</sup> BIT, Art I(1)(a).

<sup>130</sup> Claimants’ Memorial, p. 18.

<sup>131</sup> *Id.*

<sup>132</sup> BIT, Art I(1)(a).

through B&P personnel; and (v) the tangible and intangible property of B&P's interest in the joint venture.'<sup>133</sup>

123. The Claimants also submit that they are entitled to invoke the BIT's investor-State dispute settlement procedure, which is contained in Article VI.

124. Article VI(1) provides that an 'investment dispute' is:

'a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorisation granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.'<sup>134</sup>

125. Article VI(2) goes on to provide that in the event of an 'investment dispute', the parties to the dispute are to seek a resolution by negotiations. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

'(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or  
(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or  
(c) in accordance with the terms of paragraph 3.'<sup>135</sup>

126. Article VI(3) states that if 'the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose', that national or company may 'consent in writing to the submission of the dispute for settlement by binding arbitration.'<sup>136</sup>

127. Three options are provided for the national or company, namely submission of the dispute to ICSID, provided that the Party is a party to the ICSID Convention; submission of the dispute to the ICSID Additional Facility, in the event that ICSID is not available; or submission of the dispute to UNCITRAL arbitration.<sup>137</sup>

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<sup>133</sup> Claimants' Memorial, p. 23.

<sup>134</sup> BIT, Art VI(1).

<sup>135</sup> BIT, Art VI(2).

<sup>136</sup> BIT, Art VI(3).

<sup>137</sup> BIT, Art VI(3).

128. The United States signed the ICSID Convention on 27 August 1965, and ratified it on 10 June 1966, to enter into force for the United States on 14 October 1966.<sup>138</sup> Ukraine signed the ICSID Convention on 3 October 1998, and ratified it on 7 June 2000 to enter into force for Ukraine on 7 July 2000. Hence, each of the United States and Ukraine is a party to the ICSID Convention, with the result that ICSID is available for the purposes of Article VI(3)(a)(i) of the BIT.

129. The Claimants submit that the Respondent has given its consent to ICSID arbitration by virtue of Article VI(4) of the BIT, in which ‘[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3’, namely the national or company’s submission of the dispute to international arbitration.<sup>139</sup>

130. The Claimants maintain that their claims are claims under the BIT, rather than claims under the 2003 Contract. They note that their claims concern not only the University’s alleged non-compliance with its contractual obligations, but also the conduct of the CRO and the Ukrainian courts.<sup>140</sup>

## *2. Position of the Respondent*

131. The Respondent does not contest the standing of Bosh and B&P to assert a claim under the BIT. Nor does the Respondent challenge the Claimants’ submission that they have made an ‘investment’ in Ukraine within the meaning of the BIT. Although the Respondent initially objected to the Tribunal’s jurisdiction on the basis that all of the claims were ‘fundamentally contractual’,<sup>141</sup> ultimately the Respondent did not pursue its objection that the Tribunal lacked jurisdiction due to the contractual nature of the claims, but rather asserted that the Claimants’ claims neither arose under the BIT nor amounted to ‘investment disputes’.

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<sup>138</sup> ICSID, ‘List of Contracting States and other Signatories of the Convention (as of July 25, 2012)’, Document ICSID/3, available at <[www.worldbank.org/icsid](http://www.worldbank.org/icsid)> (last accessed 29 August 2012).

<sup>139</sup> BIT, Art VI(4).

<sup>140</sup> Claimants’ Post-Hearing Brief, paras. 15-17.

<sup>141</sup> Respondent’s Counter-Memorial, paras. 216-235.

### 3. *Determination of the Tribunal*

132. The Tribunal finds that Bosh and B&P are ‘companies’ within the meaning of the BIT, that the Claimants have made an ‘investment’ in Ukraine, and that the Claimants are entitled to invoke the investor-State dispute settlement procedure in Article VI of the BIT.

## **B. Admissibility of the Claimants’ Claim under the Umbrella Clause**

### 1. *Position of the Claimants*

133. In the absence of other objections, the principal jurisdictional controversy between the parties concerns the claim asserted by the Claimants under the umbrella clause in Article II(3)(c) of the BIT. The Claimants concede that their previous counsel ‘should have elaborated upon this argument’ earlier in the arbitration, but the Claimants argue that they raised this claim in their Memorial and their Reply Memorial.<sup>142</sup> The Claimants explain that they ‘remedied this omission [in their] skeleton issues statement and addressed the relevant arguments in oral submissions’.<sup>143</sup> In any event, the Claimants argue that the Respondent has addressed the umbrella clause issue in its written submissions.<sup>144</sup>

### 2. *Position of the Respondent*

134. The Respondent maintains its objection to the Claimants’ claim under the umbrella clause in Article II(3)(c) of the BIT.<sup>145</sup> The Respondent’s objection is principally made on the basis that that claim was made too late and is ‘untimely’.<sup>146</sup>

135. The Respondent submits that although the Claimants referred to the umbrella clause in their Memorial and Reply, they had not identified ‘the contractual breaches complained of’, and had ‘made no attempt to establish these breaches under the governing law of the 2003 Agreement, i.e., Ukrainian law.’<sup>147</sup> The Respondent further notes that the Claimants had, in their Reply, merely sought to invoke the umbrella clause as ‘an

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<sup>142</sup> Claimants’ Post-Hearing Brief, para. 93.

<sup>143</sup> *Id.*

<sup>144</sup> Claimants’ Post-Hearing Brief, paras 94-99.

<sup>145</sup> Respondent’s Counter-Memorial, paras. 216-235; Respondent’s Rejoinder, paras. 169-178; Respondent’s Post-Hearing Brief, paras. 151-158.

<sup>146</sup> Respondent’s Post-Hearing Brief, paras. 151-158.

<sup>147</sup> Respondent’s Post-Hearing Brief, para. 151.

alternative ground for the Tribunal's jurisdiction over this dispute',<sup>148</sup> and that the Claimants' expert, Professor Tai-Heng Cheng, had not addressed the umbrella clause in his report.<sup>149</sup> Accordingly, the Respondent asserted in its Rejoinder that the Claimants appeared to have withdrawn their umbrella clause claim.<sup>150</sup> The Respondent observed that this claim was, first, ill-formulated (in the Claimants' Memorial), then seemingly abandoned (in the Claimants' Reply), such that the Respondent did not address these claims seriously (in its Counter-Memorial and Rejoinder), with the result that the Respondent has not had the opportunity to address those claims properly.<sup>151</sup> However, the umbrella clause claim had then resurfaced in the Claimants' skeleton outline of 2 December 2011 and opening oral submissions on 7 December 2011.<sup>152</sup> The Respondent's position is that, by reason of this confined pleading, the umbrella clause claims should 'be dismissed in their entirety without any further consideration of their merits.'<sup>153</sup>

### 3. Determination of the Tribunal

136. The Tribunal understands the Respondent's objection to the Claimants' umbrella clause claim as an objection to the admissibility of that claim, rather than as an objection to the Tribunal's jurisdiction to determine the claim. In this respect, the Tribunal agrees with the tribunal in *Chevron Corporation and Texaco Petroleum Company v Ecuador*, which explained the distinction between jurisdiction and admissibility as follows:

'An objection to the admissibility of a claim does not, of course, impugn the jurisdiction of a tribunal over the disputing parties and their dispute; to the contrary, it necessarily assumes the existence of such jurisdiction; and it only objects to the tribunal's exercise of such jurisdiction in deciding the merits of a claim beyond a preliminary objection.'<sup>154</sup>

137. In the present case, the Respondent does not contest the Tribunal's personal jurisdiction over the Claimants, nor the subject-matter jurisdiction of the Claimants' claims insofar as they fall within the umbrella clause (although the Respondent does

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<sup>148</sup> Respondent's Post-Hearing Brief, para. 152.

<sup>149</sup> Respondent's Post-Hearing Brief, paras. 153-154.

<sup>150</sup> Respondent's Post-Hearing Brief, para. 155.

<sup>151</sup> *Id.*

<sup>152</sup> Respondent's Post-Hearing Brief, para. 156.

<sup>153</sup> Respondent's Post-Hearing Brief, para. 158.

<sup>154</sup> *Chevron Corporation and Texaco Petroleum Company v Ecuador* (Third Interim Award on Jurisdiction and Admissibility of 27 February 2012), para. 4.91.

contest this latter point.) Nor does the Respondent seek to argue that the claim under the umbrella clause is outside the temporal scope of the Tribunal's jurisdiction. Rather, the Respondent's preliminary objection is essentially that as the Claimants failed to articulate their umbrella clause claim until the substantive hearing and their Post-Hearing Brief, the Tribunal should decline to determine the claim.<sup>155</sup>

138. The Tribunal agrees that the presentation of the Claimants' case with regard to the umbrella clause claim has lacked precision and consistency, and that this has given rise to a degree of confusion. Nevertheless, the pleadings show that the Claimants did advert to a claim under the umbrella clause, and that the Respondent's Counter-Memorial contains a section which deals with the umbrella clause.<sup>156</sup> In its Rejoinder, the Respondent reiterated these submissions,<sup>157</sup> and the Respondent made relevant submissions in its Post-Hearing Brief.<sup>158</sup> In the circumstances, the Tribunal is of the view that the Respondent cannot maintain that it was completely taken by surprise by the presentation of the Claimants' claim at the substantive hearing.

139. Although this may be close to the margin for appropriate pleading, the Tribunal finds that the Claimants' claim under the umbrella clause is within the Tribunal's jurisdiction, was not made in an untimely fashion, and that in all the circumstances of the pleadings, principles of fairness do not require that the claims be rejected.

140. Accordingly, the Tribunal determines that it has jurisdiction over all of the Claimants' claims, and none is inadmissible.

## **VI. ATTRIBUTION**

141. The Claimants next submit that the conduct of which it complains is attributable to Ukraine under the law of State responsibility. The Claimants' claims relate to the

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<sup>155</sup> See, e.g., Transcript, Day 1, p. 80, lines 21-22; p. 81, line 1 (Mr Willems); p. 151, line 7 – p. 153, line 6 (Mr Willems).

<sup>156</sup> Respondent's Counter-Memorial, paras. 236-246.

<sup>157</sup> Respondent's Rejoinder, paras. 179-189.

<sup>158</sup> Respondent's Post-Hearing Brief, paras. 149-184.

conduct of various entities; namely, the CRO, the Ukrainian courts, the Ministry of Justice, and the University.

## **A. The CRO, the Ukrainian Courts, and the Ministry of Justice**

### *1. Position of the Claimants*

142. The Claimants argue that the CRO, the Ukrainian courts, and the Ministry of Justice are all ‘State organs’ within the meaning of Article 4 of the Articles on State Responsibility of the International Law Commission (‘ILC’).<sup>159</sup> Article 4 provides that:

‘ARTICLE 4  
*Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.’<sup>160</sup>

143. The Claimants submit that the CRO and the Ministry of Justice are ‘administrative agencies’ of Ukraine (and as such ‘State organs’),<sup>161</sup> and the Ukrainian courts are the judicial arm of Ukraine (and also a ‘State organ’), within the meaning of Article 4 of the ILC Articles on State Responsibility.

### *2. Position of the Respondent*

144. The Tribunal does not understand that the Respondent contests that any of the CRO, the Ukrainian courts, and the Ministry of Justice are not ‘State organs’ within the meaning of Article 4 of the ILC Articles on State Responsibility, and that their conduct is not attributable to Ukraine.<sup>162</sup>

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<sup>159</sup> Claimants’ Post-Hearing Brief, para. 19.

<sup>160</sup> ILC Articles on State Responsibility, Art 4.

<sup>161</sup> Claimants’ Reply, para. 122; Claimants’ Post-Hearing Brief, para. 21.

<sup>162</sup> In the Respondent’s Counter-Memorial, para. 331, the Respondent accepted that ‘the CRO’s actions and the courts’ actions could in some circumstances be attributed to Respondent’, but argued that the actions of the CRO and the courts ‘could not give rise to any liability.’ The Respondent did not address this issue in its subsequent written submissions.

### 3. *Determination of the Tribunal*

145. The Tribunal also recalls that, on the Respondent's own description, the CRO is an 'independent financial control authority within the Ministry of Finance of Ukraine'.<sup>163</sup> Further, its purpose is to ensure that 'the entities, institutions and organisations that receive State funding comply with the requirements of the laws of Ukraine regarding the use and accounting of budget funds and the use of State property.'<sup>164</sup>

146. The Tribunal determines that the conduct of the CRO is plainly attributable to Ukraine.

147. The conduct of the Ukrainian courts, as the judicial arm of Ukraine, and the Ministry of Justice, as a government department, likewise is attributable to Ukraine.

## **B. The University**

### 1. *Position of the Claimants*

148. The Claimants contend that the conduct of the University is attributable to the State, as it is a 'State budget entity that receives funding from the national government and whose rector is appointed by the President of Ukraine and holds the rank of minister.'<sup>165</sup>

149. Although this position was later abandoned, the Claimants initially advanced the view that the University was a State organ within the meaning of Article 4 of the ILC Articles on State Responsibility.<sup>166</sup>

150. The Claimants' position, as put forward at the substantive hearing and in their Post-Hearing Brief, is that the conduct of the University is attributable to Ukraine either on the

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<sup>163</sup> Respondent's Counter-Memorial, para. 94.

<sup>164</sup> *Id.*

<sup>165</sup> Claimants' Reply, para. 122.

<sup>166</sup> See, e.g., Claimants' Memorial, p. 18, where the Claimants submitted that: 'Given its unique legal status under Ukrainian law, the University likewise qualifies as a State entity.'

basis of Article 5 of the ILC Articles on State Responsibility, or, alternatively, on the basis of Article II(2)(b) of the BIT.<sup>167</sup>

151. Article 5 of the ILC Articles on State Responsibility provides that:

‘ARTICLE 5  
*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’<sup>168</sup>

152. The Claimants call in aid the ILC’s commentary to Article 5, which states that Article 5 extends to such ‘autonomous institutions as exercise public functions of a legislative or administrative character’.<sup>169</sup> In its commentary, the ILC adds that:

‘of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised, and the extent to which the entity is accountable to government for their exercise.’<sup>170</sup>

153. The Claimants also refer to the ICSID tribunal’s Decision on Jurisdiction in *Toto Construzioni Generali SpA v Lebanon*, in which the tribunal found that the conduct of an ‘independent entity’ with ‘financial and administrative autonomy’ could be attributed to the State.<sup>171</sup> The Claimants note that, as in the present case, in *Toto Construzioni*, the claimant ‘had contracted with the entity rather than with Lebanon.’<sup>172</sup>

154. The Claimants argue that the University is ‘funded by the Ukrainian State’; is ‘delegated control over State property to establish and maintain its campuses,’<sup>173</sup> is empowered by a ‘State charter’ and that the Rector of the University exercises authority ‘delegated to him under Ukrainian legislation.’<sup>174</sup> The power to appoint the Rector lay

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<sup>167</sup> Claimants’ Post-Hearing Brief, para. 20-22.

<sup>168</sup> ILC Articles on State Responsibility, Art 5.

<sup>169</sup> Claimants’ Post-Hearing Brief, para. 23; James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), pp. 100-101.

<sup>170</sup> Crawford, p. 101.

<sup>171</sup> *Toto Construzioni Generali SpA v Lebanon* (ICSID Case No ARB/07/12), Decision on Jurisdiction of 8 September 2009, para. 50; cited in Claimants’ Post-Hearing Brief, para. 24.

<sup>172</sup> Claimants’ Post-Hearing Brief, para. 24.

<sup>173</sup> Claimants’ Post-Hearing Brief, para. 26.

<sup>174</sup> *Id.*

initially with the Office of the President, and subsequently with the Cabinet.<sup>175</sup> The University is also subject to the control of the CRO.<sup>176</sup> Further, although the Respondent has argued that the Joint Activity was ‘commercial’ in nature, the Claimants also submit that this does not prevent the University’s conduct from being attributed to Ukraine.<sup>177</sup>

155. The alternative contention is that the University is a ‘State enterprise’ within the meaning of Article II(2)(b) of the BIT.<sup>178</sup>

‘Each Party shall ensure that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party’s obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.’<sup>179</sup>

156. The term ‘State enterprise’ is defined in Article I(1)(f) of the BIT as ‘an enterprise owned, or controlled through ownership interests, by a Party.’<sup>180</sup>

157. The Claimants submit that the University may be considered a ‘State enterprise’ for which the Respondent is responsible, because the term ‘State enterprise’ should be understood as including ‘a government-owned, chartered corporate entity such as the University.’<sup>181</sup> In support of this argument, the Claimants refer to the Law on Higher Education of Ukraine (Law No 2984-III), which provides in Article 17 that the State ‘implements State policy in the area of higher education’, and Article 3 of the Law on Higher Education of Ukraine provides that State policy is ‘determined by the Verkhova Rada of Ukraine’, being Ukraine’s Parliament.<sup>182</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Claimants’ Post-Hearing Brief, paras. 28-31.

<sup>178</sup> Claimants’ Memorial, p. 48.

<sup>179</sup> BIT, Art II(2)(b).

<sup>180</sup> BIT, Art I(1)(f).

<sup>181</sup> Claimants’ Post-Hearing Brief, paras. 32, 35.

<sup>182</sup> Claimants’ Post-Hearing Brief, para. 34, citing Law on Higher Education of Ukraine (Law No 2984-III) of 17 January 2002, Arts 3,17 (Exhibit RLA-103).

## 2. Position of the Respondent

158. For its part, the Respondent argues that the University is ‘a separate and autonomous juridical entity which is not a party to the ICSID arbitration’, whose conduct ‘is not attributable to Ukraine’.<sup>183</sup>

159. The Respondent contends that the University is not an ‘organ of the State’ within the meaning of Article 4 of the ILC Articles on State Responsibility on the basis that the University is legally and financially distinct from the State,<sup>184</sup> and further, that the University is not a *de facto* organ of the State as it is ‘not part of the structure of any Ministry’ and does not act in that capacity.<sup>185</sup>

160. The Respondent separately argues that the University’s conduct is not attributable to Ukraine under Article 5 of the ILC Articles on State Responsibility. It argues that the Claimants have misstated the ‘functional’ test that applies to Article 5,<sup>186</sup> and contend that the Claimants must establish both that the University is empowered to exercise governmental authority, and that the University actually exercised such authority *vis-à-vis* the Claimants in deciding to terminate the 2003 Contract.<sup>187</sup> The Respondent draws support from the ILC’s commentary to Article 5, where the ILC explains that:

‘The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.’<sup>188</sup>

161. As to its first contention, the Respondent argues that ‘the University is not empowered under Ukrainian law to exercise elements of governmental authority’, for ‘the provision of education and the management of State property do not require the exercise of any

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<sup>183</sup> See, e.g., Respondent’s Counter-Memorial, paras. 281-335; Respondent’s Rejoinder, paras. 198-201; Respondent’s Post-Hearing Brief, paras. 9-27.

<sup>184</sup> Respondent’s Post-Hearing Brief, para. 13.

<sup>185</sup> Respondent’s Post-Hearing Brief, para. 14.

<sup>186</sup> Respondent’s Post-Hearing Brief, para. 20.

<sup>187</sup> *Id.*

<sup>188</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 100.

public power’,<sup>189</sup> and in addition, ‘the University is not empowered to enter into commercial agreements on behalf of the State’, and ‘it did not do so’ in relation to the 2003 Contract.<sup>190</sup>

162. As to its second contention, the Respondent argues that, even if the University is empowered to exercise governmental authority, the termination of the 2003 Contract was not carried out in the exercise of such authority; it was simply the termination of a commercial agreement, rather than the carrying out of any sovereign act.<sup>191</sup>

### 3. *Determination of the Tribunal*

163. Although it was initially submitted by the Claimants that the conduct of the University was attributable to Ukraine under Article 4 of the ILC Articles, this position was later abandoned. For the avoidance of doubt, the Tribunal could not agree that the University is a ‘State organ’ within the meaning of Article 4 of the ILC Articles.

164. As for the question of attribution under Article 5 of the ILC Articles, the Tribunal agrees with the Respondent that in order for the University’s conduct to be attributable to Ukraine, it must be established both that:

- (1) the University is empowered by the law of Ukraine to exercise elements of governmental authority; and
- (2) the conduct of the University relates to the exercise of that governmental authority.<sup>192</sup>

165. As to the first of these two limbs, the question of the University’s authority to exercise elements of governmental authority raises complex issues concerning the University’s status under Ukrainian law.

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<sup>189</sup> Respondent’s Post-Hearing Brief, para. 22.

<sup>190</sup> Respondent’s Post-Hearing Brief, para. 23.

<sup>191</sup> Respondent’s Post-Hearing Brief, paras. 24-27, referring to *Maffezini v Spain* (ICSID Case No ARB/97/7, Decision on Jurisdiction of 25 January 2000), para. 80; and *Jan de Nul NV and Dredging International NV v Egypt* (ICSID Case No ARB/04/13, Award of 6 November 2008), paras. 167-171.

<sup>192</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 100.

166. Each party has submitted largely uncontroversial evidence concerning the University's status under Ukrainian law.<sup>193</sup> The University's autonomous status was established by the Decree of the President No 1496/99 of 25 November 1999 (Decree on National Taras Shevchenko University),<sup>194</sup> and was confirmed in the University's Charter of 2000, and the current Charter of 2009. The Charter of 2000, which was effective from 14 January 2000 until 14 March 2007, included the following provision concerning its autonomy:

'The University has the self-governing (autonomous) status of a higher educational institution, which within the limits of the competences granted by laws and other regulatory-legal acts of Ukraine, independently resolves issues of the training and advanced training of highly-qualified specialists, the education of a nationally-conscious intelligentsia.'<sup>195</sup>

167. The Charter of 2009 also confirms that the University is a separate legal entity, in the following terms:

'The University shall be a legal entity, have separate property, be able to gain property and personal non-property rights and have obligations in its own name and can be a claimant and respondent in court ... shall have its own balance sheet, emblem, flag.'<sup>196</sup>

168. The 'Law on Higher Education' (Law No 2984-III) of 17 January 2002 enables the University, as an autonomous higher educational institution, to 'organise its own educational processes', 'hire faculty and other personnel', 'develop and implement educational and scientific programs', 'create structural subdivisions, including institutes, colleges, faculties, etc', 'engage in publishing activities', 'engage in joint activity with other education institutions, organisations and enterprises', 'participate in the work of international organisations', and 'make proposals to State organs of educational management regarding possible changes to existing regulatory acts in the area of

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<sup>193</sup> Claimants' Post-Hearing Brief, paras. 22-31; Respondent's Counter-Memorial, paras. 293-304; Respondent's Rejoinder, paras. 198-201.

<sup>194</sup> Decree of the President of Ukraine No 1496/99 (25 November 1999) (Exhibit RLA-96).

<sup>195</sup> Charter of 2000, Art 1.1 (Exhibit R-6); Respondent's Counter-Memorial, para. 27.

<sup>196</sup> Charter of 2009, Art 2 (Exhibit R-52); Respondent's Counter-Memorial, para. 28.

education.’<sup>197</sup> This Law also authorises the University to exercise control over State property to establish and maintain campuses.<sup>198</sup>

169. Although the University also receives income from other sources, such as ‘payments for educational and related services, as well as scientific activities, income from securities, leases of property, credit funds and charitable contributions,’<sup>199</sup> the Tribunal accepts that the University is largely funded by the State budget (from which around 60% of its income was derived for the years 2003-2006).<sup>200</sup>

170. The Rector of the University was until 2007 appointed by the President of Ukraine. In 2008-2009, the power to appoint the Rector was then transferred to the Cabinet of Ministers of Ukraine, but in June 2009, the method of appointing the Rector was again altered such that the Rector is now elected by ‘the Conference of the Labour Collective’, which is ‘the highest self-governing body of the University and is composed of employees of the University.’ The Rector’s appointment is now formally confirmed by order of the Ministry of Education and Science of Ukraine.<sup>201</sup>

171. The Charter of 2009 confirms that University has the right to pursue business activities and make use of property for such activities, as follows:

‘The autonomy of the University shall ... provide for:

The right of the University to make independent decisions and take relevant actions in its educational, scientific-research, instructional and production-business activities:

...

The independent use of property, transferred to the University, and which shall belong to it under operational management right, including for the execution of business activity, leasing it and allowing it to be used.’<sup>202</sup>

172. It is clear from the evidence on the record that the University is a separate legal entity, and also that it has a large degree of autonomy as a higher educational institution

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<sup>197</sup> Respondent’s Counter-Memorial, para. 29, citing the Ukraine Law on Higher Education (No 2984-III) of 17 January 2002, Art 29(2) (Exhibit RLA-103).

<sup>198</sup> Claimants’ Post-Hearing Brief, para. 26, citing the Ukraine Law on Higher Education (No 2984-III) of 17 January 2002, Art 63 (Exhibit RLA-103).

<sup>199</sup> Respondent’s Counter-Memorial, para. 30, referring to Charter of 2000, Art 11(3) (Exhibit R-6).

<sup>200</sup> See, e.g., Huberskyii WS, para. 19; Respondent’s Counter-Memorial, para. 30.

<sup>201</sup> Respondent’s Counter-Memorial, paras. 32-33, referring to Charter of 2000, Art 3.2-3.3 (Exhibit R-6); Charter of 2007, Art 15 (Exhibit R-28); Charter of 2009, Arts 14-17 (Exhibit R-52).

<sup>202</sup> Charter of 2009, Art 6 (Exhibit R-52); Respondent’s Counter-Memorial, para. 35.

concerning the manner in which it organises its educational curricula and develops and implements its various educational and scientific programmes.

173. Nonetheless, the Tribunal considers that the University remains an entity that is empowered by the law of Ukraine to exercise elements of governmental authority. In this regard, it is of no moment that the University has a large degree of autonomy, as the ILC commentary to Article 5 states, that provision also covers ‘autonomous institutions as exercise public functions of a legislative or administrative character.’<sup>203</sup> The Tribunal considers that the provision by the University of, *inter alia*, higher education services and the management of State-owned property in accordance with Presidential Decree No 1496/99 of 25 November 1999, the Law on Higher Education (Law No 2984-III), and the Charters of 2000 and 2009 (which were, respectively, adopted by an Order of the President of Ukraine, and an Order of the Minister of Education and Science of Ukraine)<sup>204</sup> constitute forms of governmental authority that the University is empowered by the law of Ukraine to exercise.

174. For these reasons, the Tribunal determines that the first limb of Article 5 of the ILC Articles on State Responsibility is satisfied.

175. As to the second limb, namely the requirement that the conduct of the University must relate to the exercise of that governmental authority, the Tribunal observes that the ILC commentary explains in this regard as follows:

‘If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock.)’<sup>205</sup>

176. In accordance with the ILC’s commentary to Article 5, the Tribunal considers that it is only the ‘governmental activity’ of the University which is attributable to Ukraine

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<sup>203</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 100.

<sup>204</sup> Respondent’s Counter-Memorial, paras. 26-27.

<sup>205</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 100.

under Article 5, and not the University's 'private or commercial activity.' In other words, the question that falls for determination is whether the University's conduct in entering into and terminating the 2003 Contract with B&P can be understood or characterised as a form of 'governmental activity', or as a form of 'commercial activity.'

177. The Tribunal recalls that, under the Law on Higher Education (Law No 2984-III), the University has the right to 'engage in joint activity with other education institutions, organisations and enterprises',<sup>206</sup> and that it has the right to do so as an autonomous higher education institution. The University was entitled under its Charter to enter into the 2003 Contract in its own right, and without the need for any particular authorisation by Ukraine. In the Tribunal's view, the University's decision to enter into and subsequently terminate the 2003 Contract with B&P did not relate to the exercise of the University's governmental authority, but by reference to the nature and purpose of the 2003 Contract, as indicated for example in Articles 2(1) and 9(1) of the Contract, the terms of which are set forth above, was a private or commercial activity which was aimed to secure commercial benefits for both parties.

178. For these reasons, the Tribunal finds that the University's conduct in entering into and terminating the 2003 Contract is not attributable to Ukraine under Article 5 of the ILC Articles on State Responsibility.

179. This leaves the Claimants' argument that Ukraine is responsible for the University's conduct by virtue of Article II(2)(b) of the BIT, which provides that:

'Each Party shall ensure that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.'<sup>207</sup>

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<sup>206</sup> Law on Higher Education (No 2984-III) of 17 January 2002, Art 29(2) (Exhibit RLA-103).

<sup>207</sup> BIT, Art II(2)(b).

180. Although the point was first made by the Claimants in their Memorial,<sup>208</sup> in considering this argument the Tribunal has not had the benefit of submissions from the Respondent.

181. Article I(1)(f) of the BIT defines the term ‘State enterprise’ as ‘an enterprise owned, or controlled through ownership interests, by a Party.’ The Letter of Transmittal from the President of the United States to the Senate which accompanied the BIT merely states in relation to Article II(2)(b) that:

‘Paragraph 2 is designed to ensure that a Party cannot utilize State-owned or controlled enterprises to circumvent its obligations under the Treaty. To this end, it requires each Party to observe its treaty obligations even when it chooses, for administrative or other reasons, to assign some portion of its authority to a state enterprise, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.’<sup>209</sup>

182. Consistent with the definition of ‘State enterprise’ in Article I(1)(f), Article II(2)(b) assumes that a State enterprise has separate legal personality from ‘the Party’ (here Ukraine).

183. The Tribunal does not agree with the Claimants that the effect of Article II(2)(b) is to render the conduct of the University attributable to Ukraine. Rather, it imposes a positive obligation on Ukraine to ensure that any ‘State enterprise’ that exercises governmental authority acts in a manner that is consistent with Ukraine’s obligations under the BIT. Thus, if a protected investor in Ukraine were to consider that Ukraine had not ensured, consistently with its obligation in Article II(2)(b), that any State enterprise had acted in conformity with Ukraine’s obligations under the BIT, that would give rise to a claim for breach of the BIT against Ukraine. But it does not have the effect of making the conduct of that State enterprise attributable to Ukraine under the law of State responsibility.

184. For these reasons, the Tribunal determines that the conduct of the University that is the subject of these proceedings is not attributable to Ukraine.

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<sup>208</sup> Claimants’ Memorial, p. 48.

<sup>209</sup> Letter of Transmittal from the President of the United States to the Senate, United States – Ukraine BIT (7 November 1994) (Claimants’ Hearing Book, Tab 2).

## **VII. THE CLAIMANTS' CLAIMS**

### **A. Claims for Breach of Articles II(3)(a) and III based on the Conduct of the CRO**

#### *1. Position of the Claimants*

185. The first of the four claims maintained by the Claimants is that the conduct of the CRO constituted a breach of Articles II(3)(a) and III of the BIT.<sup>210</sup>

186. Article II(3)(a) of the BIT provides that:

‘Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.’<sup>211</sup>

187. Article III(1) of the BIT provides in part that:

‘Investments shall not be expropriated or nationalised either directly or indirectly through measures tantamount to expropriation of nationalisation (“expropriation”) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).’<sup>212</sup>

188. In the Claimants’ submission, ‘the [CRO] ordered the University to terminate its relationship with B&P. This termination order ... substantially deprived Bosh of its enjoyment of its investment in Ukraine – i.e. its participation in the Joint Activity, through B&P.’<sup>213</sup> The Claimants also argue that ‘the process by which the [CRO] came to its decision did not afford fair and equitable treatment to B&P’ because its decision-making with respect to the CRO Audit and Cross-Revision was ‘marred by a lack of due process and it also led to a manifestly arbitrary result.’<sup>214</sup> It is convenient to set out the

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<sup>210</sup> Claimants’ Post-Hearing Brief, paras 86(a), 102-137. These claims were also presented, albeit somewhat differently, in the Claimants’ Memorial, pp. 31-41 (expropriation), and pp. 41-46 (fair and equitable treatment); as well as in the Claimants’ Reply, paras. 132-177 (fair and equitable treatment), and paras. 178-210 (expropriation).

<sup>211</sup> BIT, Art II(3)(a).

<sup>212</sup> BIT, Art III(1).

<sup>213</sup> Claimants’ Post-Hearing Brief, para. 102.

<sup>214</sup> *Id.*

details of the Claimants' claims for breach of the fair and equitable treatment standard (Article II(3)(a)) and for expropriation (Article III) separately.

189. *Fair and Equitable Treatment:* The Claimants submit that the CRO's conduct violated due process, in that the CRO's cross-revision exercise amounted to an audit of B&P's compliance with the 2003 Contract, which went further than what was authorised under Ukrainian law. The Claimants also submit that B&P was denied 'any meaningful opportunity ... to participate in the process, or to contest [the CRO's] findings',<sup>215</sup> and that these actions constitute a breach of the obligation to accord fair and equitable treatment under Article II(3)(a) of the BIT.<sup>216</sup>

190. In particular, the Claimants submit that the CRO's initially stated reason for the recommendation to terminate the 2003 Contract was that 'the Joint Activity was not consistent with Ukraine's State property and budget laws', and later the CRO stated that the reason for the recommendation was that B&P had failed to comply with its obligations under the 2003 Contract.<sup>217</sup> The Claimants submit the second of these reasons that they alleged were adopted by the Respondent after the commencement of the present arbitration proceedings constitutes 'an egregious expansion of the [CRO's] authority to conduct a cross-revision exercise.'<sup>218</sup>

191. The Claimants refer in this regard to the evidence of Mr Kyrylenko, who had given evidence that the purpose of the Cross-Revision of B&P was merely 'to clarify that such activities indeed took place and were correctly reflected in the accounting of the audited entity'.<sup>219</sup> The Claimants ask, if this was indeed the case, why the CRO then proceeded to engage in a 'painstaking, clause by clause compliance review of B&P's alleged performance under its Joint Activity Agreement with the University.'<sup>220</sup>

192. In addition, or in the alternative, the Claimants argue that the CRO did not accord fair and equitable treatment to the Claimants, as B&P was not afforded due process in the

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<sup>215</sup> Claimants' Post-Hearing Brief, para. 133.

<sup>216</sup> Claimants' Post-Hearing Brief, paras. 110-112, 133-135.

<sup>217</sup> Claimants' Post-Hearing Brief, para. 134.

<sup>218</sup> Claimants' Post-Hearing Brief, para. 135.

<sup>219</sup> Claimants' Post-Hearing Brief, para. 112.

<sup>220</sup> Claimants' Post-Hearing Brief, paras. 113-114.

CRO's Cross-Revision. In the Claimants' submission, these omissions breached the requirement that governmental decisions be put to the test of procedural propriety.<sup>221</sup>

193. In this regard, the Claimants refer to the Award of the ICSID tribunal in *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary*, in which the Tribunal held that:

'Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law rings hollow.'<sup>222</sup>

194. The Claimants further submit that it makes no difference that Ukrainian law does not entitle B&P to comment on drafts since it was not the entity being subjected to the audit (it was the University which was being audited),<sup>223</sup> for there is an international standard of due process with which the Respondent must comply. They also argue that B&P submitted written comments on the Cross-Revision process, but these letters were 'unacknowledged appendices' to the Cross-Revision Report.<sup>224</sup> In summary, it is contended that there was an 'evident lack of procedural fairness' in the manner in which the Claimants were treated by the CRO.<sup>225</sup>

195. *Expropriation*: As for the Claimants' claim of expropriation, the Claimants refer to the CRO's letter to the University dated 10 May 2007, to which reference has already been made. This stated in part that:

'The University shall:

1. Take effective measures to eliminate completely the established inconsistencies and to bring the guilty officials to responsibility with respect to these breaches.

[...]

5. Consider the question of termination of joint activities with B&P, LTD as such as inconsistent with the University status being a [State] budget-maintained institution as well as return the assets to the above-mentioned company. Prevent violations of

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<sup>221</sup> Claimants' Post-Hearing Brief, paras. 110-111, 137.

<sup>222</sup> *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary* (ICSID Case No ARB/03/16), Award of 27 September 2006, para. 435; cited in Claimants' Post-Hearing Brief, para. 111.

<sup>223</sup> Claimants' Post-Hearing Brief, para. 116.

<sup>224</sup> Claimants' Post-Hearing Brief, para. 124.

<sup>225</sup> Claimants' Post-Hearing Brief, para. 125.

effective legislature by the University concerning the use of its assets (State property).

[...]

In case of failure to comply with the requirements herein stated and put forward by the Chief Control and Inspection Administration as well as failure to take sufficient measures to remedy the drawbacks and financial and budgeting breaches, the Administration shall initiate the verification of consistency of the University's management with the held respective positions'.<sup>226</sup>

196. The Claimants submit that 'the documentary evidence ... supports only one conclusion: that the [CRO] effectively ordered senior University officials to immediately terminate the Joint Activity with B&P, or else find alternative means of personal employment.'<sup>227</sup> The Claimants submit that the effect of the CRO's demand is manifestly 'expropriatory',<sup>228</sup> because as a result of this 'order', 'University officials took all necessary steps to cease its relationship with B&P and to immediately terminate the [2003 Contract], without payment of prompt, adequate and effective compensation.'<sup>229</sup> This resulted in a 'complete deprivation of the value and utility of [the Claimants'] investment in Ukraine – because [CRO] officials decided it should be so.'<sup>230</sup>

197. The Claimants argue that the CRO's conduct leading to the termination of the 2003 Contract amounts to an uncompensated 'indirect expropriation' contrary to Article III of the BIT. The Claimants submit that expropriations include not only 'open, deliberate and acknowledged takings of property', but also 'covered or incidental [governmental] interference with the use of property, which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.'<sup>231</sup> The Claimants submit that the present case amounts to an 'indirect expropriation',<sup>232</sup> which is unlawful unless four conditions are met, which include 'the payment of prompt, adequate and effective compensation and compliance with due process of law'.<sup>233</sup> In the

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<sup>226</sup> Letter dated 10 May 2007 from the CRO to the University (Exhibit R-30); see also Claimants' Memorial, pp. 11-12; Respondent's Counter-Memorial, para. 130; and Claimants' Post-Hearing Brief, para. 103. See also discussion in above n 71.

<sup>227</sup> Claimants' Post-Hearing Brief, para. 108.

<sup>228</sup> Claimants' Post-Hearing Brief, para. 109.

<sup>229</sup> Claimants' Post-Hearing Brief, paras. 109, 126-133, referring *inter alia* to the NAFTA tribunal's Award in *Metalclad Corporation v Mexico* (ICSID Case No ARB(AF)/97/1), Award of 25 August 2000.

<sup>230</sup> Claimants' Post-Hearing Brief, para. 109.

<sup>231</sup> Claimants' Post-Hearing Brief, para. 127, citing *Metalclad Corporation v Mexico* (ICSID Case No ARB(AF)/97/1), Award of 25 August 2000, para. 103.

<sup>232</sup> Claimants' Post-Hearing Brief, para. 127.

<sup>233</sup> Claimants' Post-Hearing Brief, para. 130.

Claimants' submission, because the Respondent has not paid compensation to the Claimants, and because the process by which the CRO decided that the 2003 Contract should be terminated lacked due process, the Respondent is in breach of its obligations under Article III.<sup>234</sup>

## 2. *Position of the Respondent*

198. For its part, the Respondent rejects the Claimants' 'unsubstantiated theories' concerning the CRO.<sup>235</sup> The Respondent observes that the Claimants had had to abandon their complaints regarding 'conspiracy theories at the highest levels of Government' which they had advanced in their earlier submissions,<sup>236</sup> and notes that the Claimants' claims were based on an assertion that the CRO had discovered that the University had lacked the authority to enter into the [2003 Contract], and that a threat was made to 'dismiss the University's management if they did not act to terminate the [2003 Contract].'<sup>237</sup> The Respondent therefore rejects the Claimants' claims that the conduct of the CRO constitutes a breach of the fair and equitable treatment standard, as well as the claims that the same conduct amounts to an unlawful expropriation.

199. *Fair and Equitable Treatment*: First, the Respondent submits that the CRO's audit and the Cross-Revision were carried out in accordance with relevant law and procedures, including the Law of Ukraine 'On the State Control and Revision Service in Ukraine', which provides in part that the main function of the State Control and Revision Service is to 'exercise financial control over the use of State funds',<sup>238</sup> and the 'Procedure for Holding Inspections by the State Control and Revision Service'.<sup>239</sup> The Respondent notes that, in particular, the University was notified of the Audit on 4 May 2006, being several months in advance of the planned Audit; two officers of the CRO were appointed to carry out the Audit on 23 October 2006; B&P was notified of the Cross-Revision of the Joint Activity on 8 December 2006, and was invited to provide documents in relation to

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<sup>234</sup> *Id.*

<sup>235</sup> Respondent's Post-Hearing Brief, para. 28.

<sup>236</sup> Respondent's Post-Hearing Brief, para. 29.

<sup>237</sup> Respondent's Post-Hearing Brief, para. 30.

<sup>238</sup> Respondent's Post-Hearing Brief, para. 33; Law of Ukraine On the State Control and Revision Service in Ukraine (26 January 1993), Art 2 (Exhibit RLA-89).

<sup>239</sup> Respondent's Counter-Memorial, para. 95; Respondent's Post-Hearing Brief, para. 32; Procedure for Holding Inspections by the State Control and Revision Service (20 April 2006) (Exhibit RLA-109).

the Joint Activity; the CRO issued the Cross-Revision Report on 15 December 2006; the CRO issued its Audit Report on 29 December 2006, and the CRO issued instructions to the University on 10 May 2007. The Respondent submits that the Claimants have failed to demonstrate anything surrounding the Audit or the Cross-Revision Report that was at variance with the applicable laws and regulations.<sup>240</sup>

200. Second, the Respondent argues that the CRO's Audit and Cross-Revision were carried out transparently with B&P's participation, and that B&P was not denied 'due process' in relation to the Cross-Revision. In particular, the Respondent notes that B&P was aware of the Audit as early as October 2006, that B&P participated in the Cross-Revision exercise, and that B&P had an opportunity to contest the CRO's Cross-Revision Report, which it did by submitting comments to the CRO as well as by appealing to the General Prosecutor's Office.<sup>241</sup> B&P did not, however, challenge the legitimacy of the Cross-Revision Report before the Ukrainian courts, even though it was aware that it had the possibility of doing so.<sup>242</sup> Further, and in any event, the Respondent argues that the due process requirement in the context of administrative decisions is lower than the judicial due process requirement,<sup>243</sup> and that this was met. As the Respondent put it: 'B&P had notice of the Cross-Revision, it was given an opportunity to participate in the audit process, to review the findings before they were published and to contest the findings both to the [CRO] and to the General Prosecutor's Office.'<sup>244</sup>

201. Third, the Respondent argues that the CRO did not make any finding that the University did not have the requisite authority to enter into the 2003 Contract, and the Claimants made no attempt to corroborate their unsubstantiated claim with evidence.<sup>245</sup>

202. Fourth, the Respondent submits that the Claimants have no basis for suggesting that the CRO ordered or threatened the University to terminate the 2003 Contract.<sup>246</sup> The Respondent observes that the University had already been in discussions with B&P

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<sup>240</sup> Respondent's Post-Hearing Brief, paras. 31, 32-36.

<sup>241</sup> Respondent's Post-Hearing Brief, paras. 41-42.

<sup>242</sup> Respondent's Post-Hearing Brief, paras. 44-45.

<sup>243</sup> Respondent's Post-Hearing Brief, paras. 47-48, referring to *International Thunderbird Gaming Corporation v Mexico* (Award of 26 January 2006), para. 200; and *Genin v Estonia* (ICSID Case No ARB/99/2), Award of 25 June 2001, paras. 364-365.

<sup>244</sup> Respondent's Post-Hearing Brief, para. 49.

<sup>245</sup> Respondent's Post-Hearing Brief, paras. 50-53.

<sup>246</sup> Respondent's Post-Hearing Brief, para. 31.

regarding the implementation of the 2003 Contract prior to the Cross-Revision Report, and that if there had been any pressure, there is no reason why the University would have waited until 13 September 2007 to terminate the 2003 Contract.<sup>247</sup> Further, and in any event, the Respondent submits that the CRO's letter dated 10 May 2007 is misinterpreted by the Claimants.<sup>248</sup> The Claimants interpret the letter as a threat, but the relevant language in the CRO's letter (namely, that the University 'take effective measures to eliminate completely the established inconsistencies and to bring the guilty officials to responsibility with respect to these breaches') was only directed at those issues where the CRO had determined that there had been violations of Ukrainian law; and in relation to the 2003 Contract, the CRO had only recommended that the University 'consider the question' of termination.<sup>249</sup> This was confirmed in the testimony of Mr Kyrylenko, who explained that the University had the discretion to adopt appropriate measures to address the CRO's concerns with respect to the 2003 Contract.<sup>250</sup> For instance, Mr Kyrylenko said in his witness statement that:

'In the letter, the CRO asked the University to consider the possibility of terminating the [2003 Contract] as one of the measures that would allow the University to eliminate the violations discovered during the audit. Had the University discovered another way to eliminate violations related to the joint activity that would have also been acceptable to the CRO. In any case, this letter should not be construed to mean that the CRO ordered the University to terminate the [2003 Contract], because its purpose was only to notify the University of the discovered violations and to propose that the University take appropriate measures to remedy those violations.'<sup>251</sup>

203. In his reply witness statement, Mr Kyrylenko added that:

'I wish to emphasise that the CRO did not impose the means that the University had to use in order to remedy the violations. We did not "pressure" the University to take any action. The University had to decide by itself which measures to take in this regard.'<sup>252</sup>

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<sup>247</sup> Respondent's Post-Hearing Brief, paras. 55-56.

<sup>248</sup> Respondent's Post-Hearing Brief, paras. 54-64.

<sup>249</sup> Respondent's Counter-Memorial, paras. 60-63.

<sup>250</sup> Respondent's Post-Hearing Brief, paras. 58-63; Kyrylenko WS I, paras. 25, 51-52; Kyrylenko WS II, paras. 27, 32.

<sup>251</sup> Kyrylenko WS I, para. 52.

<sup>252</sup> Kyrylenko WS II, para. 32.

204. Mr Kyrilenko also explained the position at the oral hearing.<sup>253</sup> Hence, the ultimate decision to terminate the 2003 Contract was made by the University, and not by the CRO.<sup>254</sup>

205. Further, the Respondent submits that the item 1 of the letter dated 10 May 2007, in which the CRO directed that the University ‘[t]ake effective measures to eliminate completely the established inconsistencies and to bring the guilty officials to responsibility with respect to these breaches’ did not apply to item 5, in which the CRO merely recommended that the University ‘consider the question of termination’ of the 2003 Contract.<sup>255</sup> As the Respondent submitted, because ‘item 5 did not order termination, the CRO could not impose any administrative sanction for any failure to seek termination of the 2003 Agreement.’<sup>256</sup>

206. *Expropriation:* As for the Claimants’ claims that the CRO’s letter dated 10 May 2007 amounted to an ‘expropriation’ of the Claimants’ rights under the 2003 Contract, the Respondent’s position is as stated above: namely, that the CRO only recommended that the University ‘consider the question’ of termination, and that the ultimate decision was made by the University, rather than by the CRO.<sup>257</sup>

### 3. *Determination of the Tribunal*

207. There are a number of issues to address in determining whether the conduct of the CRO constituted either:

- (1) a breach of the obligation to accord fair and equitable treatment contrary to Article II(2)(a); or
- (2) an expropriation contrary to Article III.

208. *Fair and Equitable Treatment:* The Claimants’ claim for breach of the obligation to accord fair and equitable treatment under Article II(3)(a) is primarily based on the allegations that the CRO’s Audit and Cross-Revision of the Joint Activity was not carried

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<sup>253</sup> Transcript, Day 3, p. 621, line 15 – p. 622, line 2.

<sup>254</sup> Respondent’s Counter-Memorial, para. 64.

<sup>255</sup> Letter from the CRO to the University dated 10 May 2007 (Exhibit R-30); Kyrilenko WS I, para. 25; Respondent’s Post-Hearing Brief, paras. 59-62.

<sup>256</sup> Respondent’s Post-Hearing Brief, para. 62.

<sup>257</sup> Respondent’s Counter-Memorial, paras. 60-64, 427-431.

out in accordance with Ukrainian law; that B&P was denied due process in the CRO's Cross-Revision exercise; and that the CRO exceeded its mandate in directing the University to terminate the 2003 Contract.

209. The Respondent's defence is that the CRO's Audit and Cross-Revision of the Joint Activity was conducted in conformity with the applicable laws and regulations; that B&P was in fact afforded the right to participate in the Cross-Revision; and that the CRO did not order the termination of the 2003 Contract.

210. Before addressing the Claimants' complaints, the Tribunal makes some observations as to the content of the obligation on Ukraine to accord fair and equitable treatment. The Parties have referred to various arbitral awards and decisions concerning the content of this standard of treatment,<sup>258</sup> and there would not appear to be any major disagreement between the Parties on the content of the obligation. Rather, the Parties join issue on whether Ukraine is in breach of that obligation.

211. Although the Tribunal does not consider itself bound by past decisions of other arbitral tribunals, it recognises that it should pay due regard to the conclusions of such tribunals. In this respect, the Tribunal agrees with the views of the ICSID tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, which stated that, 'unless there are compelling reasons to the contrary', tribunals 'ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case.'<sup>259</sup>

212. Having due regard to the decisions of other arbitral tribunals, the Tribunal records its agreement with the observations of the ICSID tribunal in *Joseph Charles Lemire v Ukraine*, which observed that in order to establish a breach of the obligation under Article II(3)(a) of the BIT, '[i]t requires an action or omission by the State which violates a

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<sup>258</sup> E.g., *Waste Management Inc v Mexico* (ICSID Case No ARB(AF)/00/3), Award of 30 April 2004, para. 98; *Mondev International Inc v United States* (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002, para. 127; *MTD Equity Sdn Bhd and MTD Chile SA v Chile* (ICSID Case No ARB/01/7), Award of 25 May 2004, para. 109 (all cited by the Claimants); and *International Thunderbird Gaming Corporation v Mexico* (Award of 26 January 2004), para. 200; *Genin v Estonia* (ICSID Case No ARB/99/2), Award of 25 June 2001, paras. 364-365 (both cited by the Respondent).

<sup>259</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* (ICSID Case No ARB/03/19), Award of 27 August 2009, para. 145.

certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm.’<sup>260</sup> The tribunal in that case set out relevant factors, including ‘whether the State made specific representations to the investor’; ‘whether due process has been denied to the investor’; ‘whether there is an absence of transparency in the legal procedure or in the actions of the State’; ‘whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State’; and ‘whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.’<sup>261</sup>

213. Turning to the specific complaints of the Claimants, on the basis of the evidence before it, the Tribunal considers that there is nothing to indicate that the CRO’s Audit and Cross-Revision was not in fact carried out in accordance with the applicable Ukrainian laws and regulations. In particular, the Claimants have not established that the CRO’s Audit of the University was anything other than an audit conducted in accordance with the Law of Ukraine ‘On the State Control and Revision Service in Ukraine’, which states that the main task of the State Control and Revision Service is to exercise financial control over the use of State funds.<sup>262</sup> In this regard, the Tribunal accepts that the CRO’s Audit constituted a routine review of the University’s use and management of State funds, and there is no evidence demonstrating that B&P was targeted as a foreign investor.

214. The Tribunal also considers that B&P was entitled to, and was accorded, appropriate due process in the course of the CRO’s Cross-Revision. The evidential record establishes that B&P was informed of CRO’s Audit of the University in October 2006, was informed of the Cross-Revision in December 2006, and participated in the CRO’s Cross-Revision exercise. The record shows that B&P was entitled to, and did, comment on the CRO’s Cross-Revision, and had the opportunity to challenge the Report before the General Prosecutor’s Office (which it did) as well as before the Ukrainian courts (which it did not). Had B&P elected to bring proceedings before the Ukrainian courts, there is no evidence before the Tribunal to establish that the Ukrainian courts would not have afforded B&P a fair hearing.

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<sup>260</sup> *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18), Decision on Jurisdiction and Liability of 14 January 2010, para. 284.

<sup>261</sup> *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18), Decision on Jurisdiction and Liability of 14 January 2010, para. 284.

<sup>262</sup> Law of Ukraine On the State Control and Revision Service in Ukraine (26 January 1993), Art 2 (Exhibit RLA-89).

215. The Tribunal does not accept the Claimants' allegation that the CRO's letter dated 10 May 2007 constituted an unambiguous direction to the University to terminate the 2003 Contract. The letter made 15 recommendations, only one of which concerned the University's Joint Activity under the 2003 Contract with B&P. The sole recommendation concerning the Joint Activity was that the University 'consider the question of termination of joint activities with B&P, LTD as such as inconsistent with the University's status being a [State] budget-maintained institution as well as return the assets to the abovementioned company.'<sup>263</sup> This recommendation did not direct that the University terminate the 2003 Contract; rather, it invited the University to consider the possibility of such termination. On this issue, the Tribunal accepts the testimony of Mr Kyrylenko, who explained that the formulation of the recommendation in item 5 of the CRO's letter reserved to the University the discretion to choose how to address the CRO's concerns with regards to the 2003 Contract.<sup>264</sup> The recommendation to consider terminating the 2003 Contract was based on the CRO's findings that B&P was in breach of various obligations under the 2003, including in particular that B&P and the University had not engaged in any joint activities within the meaning of the 2003 Contract.<sup>265</sup>

216. In addition, the Tribunal does not accept that the recommendation made by the CRO in item 5 of the CRO's letter is within the reach of the first paragraph of the CRO's letter, where it was directed that the University shall 'take effective measures to eliminate completely the established inconsistencies and to bring the guilty officials to responsibility with respect to these breaches.'<sup>266</sup> The Tribunal accepts Mr Kyrylenko's testimony that this directive applied to 'the established inconsistencies' identified by the CRO in its Audit Report, but that its letter dated 10 May 2007 only required the University to 'consider the question of termination' of the 2003 Contract.<sup>267</sup>

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<sup>263</sup> Letter from the CRO to the University dated 10 May 2007 (Exhibit R-30).

<sup>264</sup> Kyrylenko WS I, paras. 25, 51-52; Kyrylenko WS II, paras. 27, 32; Transcript, Day 3, p. 618, line 22 – p. 619, line 6 (Mr Kyrylenko).

<sup>265</sup> Transcript, Day 3, p. 617, line 17 – p. 622, line 2 (Mr Kyrylenko).

<sup>266</sup> Letter from the CRO to the University dated 10 May 2007 (Exhibit R-30).

<sup>267</sup> Letter from the CRO to the University dated 10 May 2007 (Exhibit R-30); Kyrylenko WS I, para. 25; Respondent's Post-Hearing Brief, paras. 59-62.

217. For these reasons, the Tribunal rejects the Claimants' claim that the conduct of the CRO constituted a breach of the obligation to accord fair and equitable treatment under Article II(3)(a) of the BIT.

218. *Expropriation*: As for the Claimants' claim that the CRO's conduct constitutes an expropriation contrary to Article III of the BIT, the Tribunal observes that in order to amount to an expropriation, the Claimants must establish that the effect of the CRO's conduct was an interference that caused a substantial deprivation of the Claimants' rights under the 2003 Contract. In this connection, the Tribunal has had regard to the conclusions of the Tribunal in *Pope & Talbot, Inc v Canada*, which held that, in the context of a claim for expropriation contrary to Article 1110 of NAFTA:

'While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner. ... [U]nder international law, expropriation requires a "substantial deprivation",<sup>268</sup>

219. The Tribunal considers that the Claimants' claim for breach of Article III suffers from the evidentiary difficulty surrounding the effect of the CRO's letter dated 10 May 2007. The Claimants assert that the CRO's letter was a direction to the University to terminate the 2003 Contract, but the consistent evidence of Mr Kyrylenko is that the CRO made no such direction to the University, and left it to the University to decide on the most appropriate means to eliminate any inconsistencies. The Tribunal accepts Mr Kyrylenko's explanation of the effect of the 10 May 2007 letter, which is consistent with a plain reading of that letter.

220. Consistent with its conclusions concerning the Claimants' claim for breach of the fair and equitable treatment obligations, the Tribunal thus decides that the CRO's actions did not terminate the 2003 Contract. Rather, the CRO carried out its functions in accordance with applicable Ukrainian law and regulations, and the final decision concerning termination was made by the University. Accordingly, the Tribunal rejects the Claimants' claim that the conduct of the CRO constituted a breach of the obligation not to expropriate investments contrary to Article III of the BIT.

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<sup>268</sup> *Pope & Talbot v Canada* (Interim Award of 26 June 2000), para. 102.

## **B. Claim for Breach of Article II(3)(a) of the BIT Based on the University's Conduct**

### *1. Position of the Claimants*

221. The Claimants' second claim is that the manner in which University officials acted constituted a failure to act in good faith towards B&P and was thus contrary to the obligation to accord fair and equitable treatment under Article II(3)(a), which provides as follows:

'Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.'<sup>269</sup>

222. In particular, the Claimants argue that, rather than seeking to work with B&P to improve its implementation, the approach adopted by University officials, whereby they sought to terminate the 2003 Contract was a violation of the good faith standard embodied in Article II(3)(a), rather than seeking proper implementation of the Agreement.<sup>270</sup> The Claimants assert that University officials failed to enter into dialogue with B&P over its alleged breaches of the Agreement, failed to take any steps to bring themselves into compliance with the Agreement, and actively sought out excuses to justify termination.

223. The Claimants further submit that it was the 'legitimate expectation of each party [to the 2003 Contract] that B&P would benefit from the addition of the University-backed Joint Activity to its international business education network, and that the University would reap the programmatic and financial benefits from revitalisation of the Complex, participation in the Joint Activity and membership in B&P's international business education network.'<sup>271</sup>

224. However, in the Claimants' submission, once the CRO had made its recommendation in its letter dated 10 May 2007, the University adopted the position that the 2003 Contract was void *ab initio* as it was inconsistent with the Commercial Code of Ukraine and the

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<sup>269</sup> BIT, Art II(3)(a).

<sup>270</sup> Claimants' Post-Hearing Brief, para. 161.

<sup>271</sup> Claimants' Post-Hearing Brief, para. 143.

Civil Code of Ukraine, and therefore violated Ukraine's *ordre public*, and this position was advanced by the University in its pleadings before the Kiev Commercial Court.<sup>272</sup> The Claimants submit that the Respondent then chose to focus on B&P's alleged substantial breaches of the 2003 Contract, allegedly because 'anything less than a [substantial] breach would not provide grounds for termination under applicable Ukrainian law.'<sup>273</sup>

## 2. *Position of the Respondent*

225. For its part, the Respondent submits that the conduct of the University is not attributable to the Respondent. In any event, the Respondent contends that the University did not frustrate the Claimants' legitimate expectations with respect to the 2003 Contract.<sup>274</sup> The Respondent argues that the Claimants' legitimate expectations are inextricably linked with the rights under the 2003 Contract, and that accordingly, because the 2003 Contract could be terminated in accordance with its terms (as was recognised by Mr Boguslavskyy, the former CEO of B&P, in cross-examination),<sup>275</sup> the Claimants could not have had any expectation that the 2003 Contract would continue indefinitely.

226. The Respondent understands that the Claimants' alleged legitimate expectations include, first, the fact that the University was authorised to enter into the 2003 Contract, and second, an expectation that B&P would be compensated in the event of early termination.<sup>276</sup> In the Respondent's submission, the Claimants' claims that these legitimate expectations have been frustrated are misconceived.

227. As to the Claimants' first alleged legitimate expectation, the Respondent claims that the University validly entered into the 2003 Contract, and there is nothing on the record to say otherwise.<sup>277</sup> As to the second, the Respondent rejects the Claimants' suggestion that the University deprived B&P of its contractual rights to seek compensation for early termination of the 2003 Contract.<sup>278</sup> After the 2003 Contract was terminated,

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<sup>272</sup> Claimants' Post-Hearing Brief, para. 146-148.

<sup>273</sup> Claimants' Post-Hearing Brief, para. 149 (emphasis in original removed).

<sup>274</sup> Respondent's Post-Hearing Brief, paras. 130-148.

<sup>275</sup> Respondent's Post-Hearing Brief, paras. 131-132; Transcript, Day 1, p. 250, lines 15-18.

<sup>276</sup> Respondent's Post-Hearing Brief, paras. 133.

<sup>277</sup> Respondent's Post-Hearing Brief, paras. 134-135.

<sup>278</sup> Respondent's Post-Hearing Brief, para. 136.

negotiations were held between the University and B&P concerning the amount of compensation, and at the suggestion of B&P, the University obtained an independent valuation of B&P's contribution to the Joint Activity, but the proposed amount (UAH 1.485 million) was not accepted by B&P, although B&P failed to comment on the valuation, and nor did it present a competing valuation report.<sup>279</sup> Nor did B&P make any submissions concerning the non-payment of compensation in the various proceedings before the Ukrainian courts, even though B&P had ample opportunity to do so.<sup>280</sup> In the present arbitration, the Claimants now claim UAH 6,666,700, but this claimed amount includes compensation in respect of future lost profits, which are not covered by the 2003 Contract.<sup>281</sup>

### *3. Determination of the Tribunal*

228. As the Tribunal has determined that the conduct of the University that is the subject of these proceedings is not attributable to Ukraine under the international law of State responsibility for the reasons expressed in Part V(B) above, it rejects the Claimants' claims for breach of Article II(3)(a) on the basis of the University's conduct and dealings with B&P.

## **C. Claim for Breach of Article II(3)(c) of the BIT Based on the University's Alleged Substantial Breach of the 2003 Contract**

### *1. Position of the Claimants*

229. The Claimants argue that the Respondent is in breach of Article II(3)(c) of the BIT, the 'umbrella clause', because University officials had committed a substantial breach of the 2003 Contract Agreement contrary to Ukrainian municipal law.

230. Article II(3)(c) provides as follows:

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<sup>279</sup> Respondent's Post-Hearing Brief, paras. 138-141.

<sup>280</sup> Respondent's Post-Hearing Brief, paras. 144-147.

<sup>281</sup> Respondent's Post-Hearing Brief, para. 142, referring to Claimants' Skeleton Outline, p. 10.

‘Each Party shall observe any obligation it may have entered into with regard to investments.’<sup>282</sup>

231. The Claimants submit that the umbrella clause in the BIT permits them to assert their contractual claims under the BIT, for such provisions can have the effect of elevating contractual claims to the level of a treaty claim.<sup>283</sup>

232. The Claimants’ claim under the umbrella clause is based on the University’s alleged substantial breach of the 2003 Contract in seeking early termination of that Contract. As noted above, the Claimants referred to the procedure for the termination of contracts is provided for in Article 651(2) of the Ukrainian Civil Code:

‘A contract may be amended or terminated by the decision of a court, upon the demand of one of the parties, due to a substantial breach of the contract by the other party, and in other cases stipulated by the contract or the law. A breach of a contract by one of the parties is substantial when as a result of the damages suffered due to such breach, the other party becomes significantly deprived of the benefits anticipated at the time of conclusion of the contract.’<sup>284</sup>

233. The Claimants first argue that B&P did not commit a substantial breach of the 2003 Contract that gave the Respondent the right to seek early termination. The Respondent’s justifications for seeking termination of the 2003 Contract are that B&P had committed a substantial breach of the 2003 Contract for two reasons: first, it had failed to establish a separate bank account for the Joint Activity; and second, B&P had failed to conduct the activities described in the Agreement.<sup>285</sup>

234. On the first of these issues, the 2003 Contract provides in Article 4(6) that:

‘Financial transactions related to the joint activity of the Parties shall be conducted by means of the joint activity settlement account which is opened after the registration of this Contract in accordance with the current laws of Ukraine.’<sup>286</sup>

235. The Claimants contend that the Respondent incorrectly understands this as a requirement to open a bank account, but it only requires that a ‘settlement account’ (or

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<sup>282</sup> BIT, Art II(3)(c).

<sup>283</sup> Claimants’ Post-Hearing Brief, paras. 69-95, in which the Claimants refer to, e.g., *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004.

<sup>284</sup> Ukrainian Civil Code, Art 651(2) (Exhibit RLA-81); Claimants’ Post-Hearing Brief, para. 189.

<sup>285</sup> Claimants’ Post-Hearing Brief, para. 173.

<sup>286</sup> 2003 Contract, Art 4(6) (Exhibit R-9).

‘accounting account’) be maintained,<sup>287</sup> which might also be described as a ‘book of accounts’, or ledger to record transactions.<sup>288</sup> To fulfil this obligation, Ms Romanchuk, the former Chief Accounting Officer, and later CEO, of B&P, kept a ‘settlement account’ to track the movement of funds concerning the Joint Activity funds.<sup>289</sup> On the basis of this evidence, the Claimants submit that the University could not maintain that B&P was in breach of Article 4(6) of the 2003 Contract.

236. As to the second of these issues, the Claimants submit that the 2003 Contract provides in Article 2(1) that the parties must act ‘jointly for the purpose and creation of the [Science-Hotel Complex] ... shall engage jointly in [activities].’<sup>290</sup> In the Claimants’ submission, this means that neither party is solely responsible for joint activities, but that the parties have to act jointly.<sup>291</sup> The Claimants reject the Respondent’s allegation that B&P failed to carry out ‘joint activities’ at the Science-Hotel Complex, and argue that the Science-Hotel Complex hosted educational conference, seminars and lectures which were of relevance to a business school, which were described by the Claimants’ witnesses.<sup>292</sup> In the course of the Cross-Revision exercise, B&P’s officers had provided the CRO with ‘all necessary documentation in response to their requests’, which ‘outlined the conferences, seminars, educational activities and other such events.’<sup>293</sup> The Claimants argue further that, in any event, even if there were a breach, this was not substantial so as to ‘substantially deprive the University of the benefits of the Agreement.’<sup>294</sup>

237. The Claimants claim that the University was in substantial breach of the 2003 Contract ‘when its officials took categorical steps to end the joint activities that were being maintained by B&P on behalf of the University’, and assert that the ‘line was crossed when the University obtained and enforced an eviction order from the Ukrainian courts against B&P’.<sup>295</sup> In addition, the Claimants also assert that the University had failed to comply with its contractual obligations by failing to remove squatters in the

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<sup>287</sup> Claimants’ Post-Hearing Brief, paras. 175-178; Transcript, Day 2, p. 338, line 1 – p. 348, line 20.

<sup>288</sup> Claimants’ Post-Hearing Brief, para. 176.

<sup>289</sup> Claimants’ Post-Hearing Brief, paras. 174-178.

<sup>290</sup> 2003 Contract, Art 2(1).

<sup>291</sup> Claimants’ Post-Hearing Brief, paras. 179-180.

<sup>292</sup> Claimants’ Post-Hearing Brief, paras. 181-182.

<sup>293</sup> Claimants’ Post-Hearing Brief, para. 183.

<sup>294</sup> Claimants’ Post-Hearing Brief, para. 186.

<sup>295</sup> Claimants’ Post-Hearing Brief, para 190.

Science-Hotel Complex, and had also failed to provide funds for the Phase II renovations.<sup>296</sup>

238. The Claimants argue that B&P's eviction from the Science-Hotel Complex had ended any possibility for B&P to mitigate its losses, which had been accruing since the Phase II renovations were stalled.<sup>297</sup> The University's conduct was a substantial breach on 21 January 2009, the day that B&P was denied physical access to the Complex.<sup>298</sup>

## 2. *Position of the Respondent*

239. In response, the Respondent argues that Ukraine is not a party to the 2003 Contract as the University is B&P's contractual counterparty, and reiterates that the University's conduct is not attributable to Ukraine.<sup>299</sup> The Respondent argues further that even if the University's conduct were attributable to Ukraine, the umbrella clause does not have the effect of elevating claims for breach of contract into claims for breach of treaty.<sup>300</sup>

240. In any event, the Respondent argues that the University did not breach the 2003 Contract. To the contrary, the Respondent contends that it was B&P that breached the 2003 Contract, and that the Ukrainian courts have confirmed that B&P's breaches were of such a character to justify the University's termination of the 2003 Contract, which the University had done under applicable Ukrainian law.<sup>301</sup>

## 3. *Determination of the Tribunal*

241. The Tribunal recalls that it has already determined that the conduct of the University that is the subject of these proceedings is not attributable to the Respondent, and in this sense, to the extent that the University has failed to comply with its obligations under the 2003 Contract, or committed a substantial breach of that contract, that conduct is not attributable to the Respondent.

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<sup>296</sup> Claimants' Post-Hearing Brief, para. 191.

<sup>297</sup> Claimants' Post-Hearing Brief, para. 192.

<sup>298</sup> *Id.*

<sup>299</sup> Respondent's Post-Hearing Brief, paras. 160-166.

<sup>300</sup> Respondent's Post-Hearing Brief, paras. 167-173, referring to, e.g., *SGS v Pakistan* (ICSID Case No ARB/01/13), Decision on Jurisdiction of 6 August 2003.

<sup>301</sup> Respondent's Post-Hearing Brief, para. 180.

242. It remains to be determined by the Tribunal whether the Respondent has assumed any obligations vis-à-vis the Claimants by virtue of the umbrella clause in Article II(3)(c), which provides:

‘Each Party shall observe any obligation it may have entered into with regard to investments.’<sup>302</sup>

243. The Tribunal observes that this obligation is incumbent on ‘each Party’ to the BIT to ‘observe any obligation it may have entered into with regard to investments.’ It is undisputed that Ukraine did not enter into the 2003 Contract with B&P, but that it was the University that entered into this contract. Nevertheless, the Tribunal considers it necessary to determine whether the term ‘Party’ in Article II(3)(c) is limited to the two States parties to the BIT or whether it also extends to entities that are controlled by ‘each Party.’

244. The Tribunal recalls that, as is confirmed by the Decree of the President No 1496/99 of 25 November 1999 (Decree on National Taras Shevchenko University), and as is also confirmed in the University’s Charter of 2000, and the current Charter of 2009, the University has an autonomous status. The Tribunal recalls further that it has concluded above that the University is authorised to exercise elements of governmental authority.

245. However, the Tribunal notes that the BIT contains the definition in Article I(1)(f) of the BIT provides that a ‘State enterprise’ is ‘an enterprise owned, or controlled through ownership interests, by a Party.’<sup>303</sup> Although the University is ‘owned, or controlled’ by a Party, a State enterprise is not included within the meaning of the term ‘Party’ for the purpose of the BIT (the Tribunal also noting that the preamble defines the term ‘Parties’ as referring to ‘the United States of America and Ukraine’). Leaving to one side the question of whether the University is in fact a ‘State enterprise’ within the meaning of the BIT, which the Tribunal does not determine, the Tribunal nonetheless considers it relevant to observe that the BIT draws a distinction between the term ‘Party’ as a legal entity, and the term ‘State enterprise’ as a legal entity. This leads the Tribunal to conclude that the University and the State should be regarded as separate entities.

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<sup>302</sup> BIT, Art II(3)(c).

<sup>303</sup> BIT, Art I(1)(f).

246. For these reasons, the Tribunal concludes that the term ‘Party’ in the umbrella clause refers to any situation where the Party is acting *qua* State. This means that where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility), such entities are considered to be ‘the Party’ for the purposes of Article II(3)(c). As the Tribunal has concluded above that the conduct of the University is not attributable to Ukraine, it follows that it cannot be said that Ukraine, as a ‘Party’, has entered into any obligations (in the 2003 Contract) with regard to investments. Rather, if the umbrella clause is to have the effect argued for by the Claimants, it could only do so in respect of obligations that have been assumed by the host State or by an entity whose conduct is attributable to the host State. In this regard, the Tribunal agrees with the conclusion of the ICSID tribunal in *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay*, which, in relation to the particular facts of that case, including the terms of the umbrella clause in issue, stated that:

‘On a plain meaning, [umbrella clauses] are undoubtedly capable of being read to include a contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, whereby the alleged breaches of the Ministry are attributable to the State.’<sup>304</sup>

247. The Tribunal also agrees with the view of the ICSID tribunal in *SGS Société Générale de Surveillance SA v Philippines*, which held that although the umbrella clause in Article X(2) of the Switzerland-Philippines BIT made it a breach of the BIT for the host State ‘to fail to observe binding commitments, including contractual commitments, which it had assumed with regard to specific investments’, the umbrella clause did not have the effect of converting ‘the *extent* or *content* of such obligations into an issue of international law.’<sup>305</sup> Rather, the scope of the contractual obligations had to be determined in accordance with the contract.<sup>306</sup>

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<sup>304</sup> *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay* (ICSID Case No ARB/07/9), Decision on Jurisdiction of 19 May 2009, para. 141.

<sup>305</sup> *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, para. 128 (emphasis in original).

<sup>306</sup> *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, para. 128.

248. Although the conclusion of the Tribunal that an umbrella clause might in principle be capable of making a claim under a contract justiciable under a BIT is fortified by a review of the cases cited by the Parties, as well as a number of others, which have involved claims brought under an umbrella clause, in none of these cases was the relevant contract entered into by the investor with an entity akin to the University.

1. In *SGS Société Générale de Surveillance SA v Pakistan*, the contract was concluded between the investor and the Government of Pakistan.<sup>307</sup>

2. In *SGS Société Générale de Surveillance SA v Philippines*, the contract in issue was concluded between the investor and the Government of the Philippines.<sup>308</sup>

3. In *Joy Mining Machinery Ltd v Egypt*, the contract was concluded between the investor and the General Organisation for Industrial and Mining Projects of Egypt, a State agency (although the tribunal did not decide the status of the General Organisation for Industrial and Mining Projects, which was contested by the Respondent.)<sup>309</sup>

4. In *Impregilo SpA v Pakistan*, the contract at issue was between the investing consortium (Ghazi Barotha Contractors, in which Impregilo SpA was a participant) and the Pakistani Water and Power Development Authority, an instrumentality of the Government of Pakistan (although the ICSID tribunal did not finally determine the question of Pakistan's responsibility for alleged breaches of the BIT by the Water and Power Development Authority.)<sup>310</sup>

5. In *CMS Gas Transmission Company v Argentine Republic*, the license contract was entered into between an Argentine company in which the investor directly or indirectly held shares, and the Government of the Argentine Republic.<sup>311</sup>

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<sup>307</sup> *SGS Société Générale de Surveillance SA v Pakistan* (ICSID Case No ARB/01/13), Decision on Jurisdiction of 29 August 2003, para. 11.

<sup>308</sup> *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, para. 13.

<sup>309</sup> *Joy Mining Machinery Ltd v Egypt* (ICSID Case No ARB/03/11), Award on Jurisdiction of 6 August 2004, para. 15.

<sup>310</sup> *Impregilo SpA v Pakistan* (ICSID Case No ARB/03/3), Decision on Jurisdiction of 22 April 2005, paras. 13, 210, 262, 266(a).

<sup>311</sup> *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8), Award of 12 May 2005, paras. 299-303; *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8), Decision on Jurisdiction of 17 July 2003, para. 19.

6. In *Eureko v Poland*, the contract was concluded between the investor and the State Treasury of Poland.<sup>312</sup>

7. In *Noble Ventures, Inc v Romania*, the contract was concluded between the investor and the Romanian State Ownership Fund, an instrumentality of the Government of Romania.<sup>313</sup>

8. In *El Paso Energy International Company v Argentine Republic*, the contracts were concluded between companies in which the investor indirectly owned shares and the Government of the Argentine Republic.<sup>314</sup>

9. In *Azurix Corporation v Argentine Republic*, the contract at issue was between the investor's Argentine subsidiary and the Province of Buenos Aires.<sup>315</sup>

10. In *LG&E Energy Corporation v Argentine Republic*, the license contract was concluded between three Argentine companies in which the investor directly or indirectly held shares, and the Government of the Argentine Republic.<sup>316</sup>

11. In *Siemens AG v Argentine Republic*, the contract was entered into between the investor's Argentine subsidiary and the Government of the Argentine Republic.<sup>317</sup>

12. In *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, the contract was entered into between an Argentine company in which the investor directly or indirectly held shares, and the Government of the Argentine Republic.<sup>318</sup>

13. In *Sempra Energy International v Argentine Republic*, the contract was concluded between an Argentine company in which the investor indirectly held shares, and the Government of the Argentine Republic.<sup>319</sup>

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<sup>312</sup> *Eureko v Poland* (Partial Award of 19 August 2005), para. 41.

<sup>313</sup> *Noble Ventures, Inc v Romania* (ICSID Case No ARB/01/11), Award of 12 October 2005, para. 2.

<sup>314</sup> *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15), Decision on Jurisdiction of 27 April 2006, paras. 66-85; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15), Award of 31 October 2011, paras. 178-198, 531-538.

<sup>315</sup> *Azurix Corporation v Argentine Republic* (ICSID Case No ARB/01/12), Award of 14 July 2006, para. 41.

<sup>316</sup> *LG&E Energy Corporation v Argentine Republic* (ICSID Case No ARB/02/1), Decision on Liability of 3 October 2006, paras. 34-52.

<sup>317</sup> *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8), Award of 17 January 2007, para. 84.

<sup>318</sup> *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3), Award of 22 May 2007, paras. 43-44.

<sup>319</sup> *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16), Award of 28 September 2007, paras. 82-94.

14. In *Duke Energy Electroquil Partners & Electroquil SA v Ecuador*, the contract at issue was between one of the investors and INECEL, a State-owned entity under the Ministry of Natural Resources and Energy.<sup>320</sup>

15. In *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay*, the contract was entered into between the investor and the Ministry of Finance of Paraguay.<sup>321</sup>

16. In *Toto Costruzioni Generali SpA v Lebanon*, the contract was entered into between the investor and the ‘Conseil Exécutif des Grands Projets’ of Lebanon (an entity attached to the Ministry of Public Works), which was subsequently replaced by the Council for Redevelopment and Reconstruction, both of which were considered by the tribunal to be entities whose conduct was attributable to Lebanon in accordance with Article 5 of the ILC Articles on State Responsibility.<sup>322</sup>

17. In *Al-Bahloul v Tajikistan*, the contracts were concluded between the investor, and a company owned by the investor, and the State Committee for Oil and Gas of the Republic of Tajikistan.<sup>323</sup>

18. In *Gustav F W Hamester GmbH & Co KG v Ghana*, the contract was entered into between the investor and the Ghana Cocoa Board, an entity exercising elements of governmental authority (although the ICSID tribunal ultimately decided that the conduct of the Ghana Cocoa Board in question was not attributable to Ghana under Article 5 of the ILC Articles on State Responsibility.)<sup>324</sup>

19. In *Burlington Resources Inc v Ecuador*, the contracts were between subsidiaries of the investor and the Government of Ecuador.<sup>325</sup>

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<sup>320</sup> *Duke Energy Electroquil Partners & Electroquil SA v Ecuador* (ICSID Case No ARB/04/19), Award of 18 August 2008, paras. 10, 16, 317-325.

<sup>321</sup> *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay* (ICSID Case No ARB/07/9), Decision on Jurisdiction of 19 May 2009, para. 7.

<sup>322</sup> *Toto Costruzioni Generali SpA v Lebanon* (ICSID Case No ARB/07/12), Decision on Jurisdiction of 11 September 2009, paras. 16-17, 43-60.

<sup>323</sup> *Al-Bahloul v Tajikistan* (Partial Award on Jurisdiction and Liability of 2 September 2009), paras. 17, 256-270.

<sup>324</sup> *Gustav F W Hamester GmbH & Co KG v Ghana* (ICSID Case No ARB/07/24), Award of 10 June 2010, paras. 22, 189-197, 202-285, 291, 362(iii).

<sup>325</sup> *Burlington Resources Inc v Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No ARB/08/5), Decision on Jurisdiction of 2 June 2010, paras. 8-17, 193.

20. In *SGS Société Générale de Surveillance SA v Paraguay*, the contract was between the investor and the Ministry of Finance of the Government of Paraguay.<sup>326</sup>

249. Insofar as the Claimants' claim under the umbrella clause relies on obligations on the University under the 2003 Contract, given that the Tribunal has decided that the conduct of the University that is the subject of these proceedings is not attributable to Ukraine under the international law of State responsibility, the Claimants' claim must fail.

250. In light of the conclusion reached above, it is unnecessary for the Tribunal to consider whether, even if the University's conduct in question were attributable to Ukraine, the Claimants' umbrella clause claim would succeed. Nevertheless, in view of the submissions of the Parties, and for the sake of completeness, the Tribunal has considered it appropriate to expand its analysis to decide this issue.<sup>327</sup> Having done so, the Tribunal has come to the conclusion that the Claimants' claim would nonetheless fail.

251. The Tribunal takes the position that in order to present a contractual claim under the umbrella clause in the BIT, the Claimants (here B&P) are required to have their rights and obligations under the 2003 Contract determined by the applicable dispute settlement forum, i.e., in accordance with Article 13(1) of the 2003 Contract, which refers the parties to dispute settlement 'in accordance to the Ukrainian legislation'.<sup>328</sup> In other words, B&P is obliged to follow the dispute settlement provision included in the 2003 Contract. The Tribunal agrees with the ICSID tribunal in *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay*, which, in the context of the Netherlands – Paraguay BIT, stated that:

'Assuming that Article 3(4) does import the obligations under the Contract into the BIT, giving this Tribunal jurisdiction to interpret and apply the Contract as such, then it must have imported into the BIT all of the obligations owed by Paraguay to BIVAC under the Contract. This would include not only the obligation to make payment of invoices in accordance with the requirements of the Contract, but also the obligation (implicit if nothing else) to ensure that the Tribunals of the City of Asunción were

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<sup>326</sup> *SGS Société Générale de Surveillance SA v Paraguay* (ICSID Case No ARB/07/29), Award of 10 February 2012), para. 26.

<sup>327</sup> See also *Gustav F W Hamester GmbH & Co KG v Ghana* (ICSID Case No ARB/07/24), Award of 10 June 2010, paras. 313-315.

<sup>328</sup> 2003 Contract, Art 13(1).

available to resolve any “conflict, controversy or claim which arises from or is produced in relation to” the Contract.<sup>329</sup>

252. The present Tribunal agrees, and concludes that where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract.

253. This conclusion is also consistent with that of the ICSID tribunal in *SGS Société Générale de Surveillance SA v Philippines*, which held that the Switzerland – Philippines BIT ‘did not purport to override the exclusive jurisdiction clause in the CISS Agreement, or to give SGS an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement.’<sup>330</sup> The ICSID tribunal concluded that it

‘should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.’<sup>331</sup>

254. The Tribunal also agrees with the tribunals in *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay* and *SGS Société Générale de Surveillance SA v Philippines* that the question whether the Claimants can submit contractual claims under the umbrella clause in Article II(3)(c) of the BIT will depend on an analysis of the contractual forum selection provision in question, namely Article 13(1) of the 2003 Contract.

255. As has been set out above, Article 13(1) provides that:

‘All disputes between the Parties in connection to which no agreement has been reached shall be settled in accordance to the Ukrainian legislation.’<sup>332</sup>

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<sup>329</sup> *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay* (ICSID Case No ARB/07/9), Decision on Jurisdiction of 19 May 2009, para. 142.

<sup>330</sup> *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, para. 143.

<sup>331</sup> *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, para. 155.

<sup>332</sup> 2003 Contract, Art 13(1).

256. The Claimants have submitted that Article 13(1) should be interpreted as requiring the dispute between B&P and the University to be submitted for settlement under the BIT. This is because the BIT ‘forms part of the national legislation of Ukraine’, and that it did so in 2003, at the time of the conclusion of the 2003 Contract.<sup>333</sup> For its part, the Respondent rejects the Claimants’ position as ‘absurd’, and submits that under Article 12 of Ukraine’s Code of Commercial Procedure, the jurisdiction of the Ukraine courts extends to ‘cases on disputes arising out conclusion, amendment, denunciation and execution of commercial contracts.’<sup>334</sup> Further, the BIT only provides for the resolution of disputes where the investor is the claimant. This means that, if Article 13(1) of the 2003 Contract were interpreted as requiring any disputes under the Contract to be resolved in accordance with the BIT’s dispute settlement procedures, the University – one of the parties to the 2003 Contract – would have no standing to assert a claim, for the BIT does not cater for claims to be brought by the Contracting Parties against an investor, let alone by an entity such as the University.<sup>335</sup>

257. The Tribunal accepts the position of the Respondent, and finds that Article 13(1) of the 2003 Contract is an exclusive jurisdiction clause that requires any dispute arising under the Contract to be submitted to the Ukrainian courts. The Tribunal observes that this conclusion was also reached by three levels of Ukrainian courts in the litigation concerning the termination of the 2003 Contract, although it had initially been rejected.

258. Were it necessary to decide this issue, the Tribunal would accordingly find that in order to invoke the umbrella clause in Article II(3)(c) of the BIT, the Claimants would first have to submit their claims under the contract for settlement in accordance with the jurisdictional clause in Article 13(1) of the 2003 Contract, i.e., to the Ukrainian courts. On the facts of the present dispute, the dispute was, in fact, referred to the Ukrainian courts, albeit in the context of the University’s claim for termination of the 2003 Contract, rather than any claim by B&P that the University was in breach. The matter was considered by three levels of Ukrainian courts, which decided that they had jurisdiction over the dispute concerning the termination of the 2003 Contract, and terminated it in accordance with applicable Ukrainian legislation.

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<sup>333</sup> Claimants’ Post-Hearing Brief, paras. 63-65, referring, *inter alia*, to Law No 226/94/VR, which allegedly ‘absorbed’ the BIT into Ukraine’s domestic legislation.

<sup>334</sup> Code of Commercial Procedure, Art 12 (Exhibit RLA-83); Respondent’s Post-Hearing Brief, paras. 93-99.

<sup>335</sup> Respondent’s Post-Hearing Brief, paras. 93-99.

259. It is thus apparent that the extent and content of B&P's rights under the 2003 Contract have been determined in accordance with the applicable dispute settlement procedure, with the result being that the Ukrainian courts terminated the 2003 Contract. This having occurred, the Tribunal finds that the Claimants could not now claim that B&P has rights under the 2003 Contract that it can properly assert under the umbrella clause. Even assuming that the University's conduct was attributable to the Respondent, for these reasons, the Tribunal would reject the Claimants' claim for breach of Article II(3)(c).

#### **D. Claim for Breach of Article II(3)(a) Based on the Conduct of the Ukrainian Courts and the Ministry of Justice**

##### *1. Position of the Claimants*

260. The Claimants' fourth claim is that Ukraine is responsible for a breach of the obligation to accord fair and equitable treatment contrary to Article II(3)(a) because the Ukrainian courts failed to act consistently with the principle of *res judicata* during the Ukrainian court proceedings initiated by the University to terminate the 2003 Contract. The Claimants argue that, as a general principle of law, the principle of *res judicata* applies in Ukrainian law, and forms part of the fair and equitable treatment standard.<sup>336</sup>

261. The Claimants refer to a number of decisions of national and international courts and tribunals as well as learned writings on the principle of *res judicata* and its status as a general principle of law that is applicable within the Ukrainian legal order. The Claimants argue that '*res judicata* is composed of three cumulative elements: (1) identity of the parties to the dispute; (2) object of the claim; and (3) grounds for the claim.'<sup>337</sup>

262. As noted above, the factual basis of the Claimants' claim for breach of Article III(3)(a) is that on 4 October 2007 the University initiated proceedings in the Kiev Commercial Court by submitting a statement of claim (No 03-101) for termination of the 2003 Contract as well as the transfer of B&P's 50% interest in the joint venture to the

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<sup>336</sup> Claimants' Post-Hearing Brief, paras. 193-200.

<sup>337</sup> Claimants' Post-Hearing Brief, paras. 196-199, 200-201, 204, 209, referring, *inter alia*, to *Company General of the Orinoco Case (France v Venezuela)* (1905) 10 UNRIAA 184, 186.

University.<sup>338</sup> On 29 October 2007, Judge Kovtun held that the Kiev Commercial Court lacked jurisdiction to determine the case, because it fell within the jurisdiction of ICSID, thus accepting B&P's submissions. Judge Kovtun therefore did not accept the University's claim.<sup>339</sup>

263. Instead of appealing this decision, the University refiled the same statement of claim on 2 November 2007 before a different judge (Judge Khrypun), and despite B&P's objections, the matter was set down for trial by Judge Khrypun's Ruling of 23 November 2007.<sup>340</sup> On 16 January 2008, Judge Khrypun issued a judgment which terminated the 2003 Contract.<sup>341</sup> Judge Khrypun rejected B&P's submission that the BIT was applicable to the dispute between the parties, and concluded that the 2003 Contract was 'commercial'. For Judge Khrypun, it followed from this that the dispute was subject to the jurisdiction of the Ukrainian courts, holding that: 'According to the Article 12 of the Code of Commercial Procedure of Ukraine, all the disputes arising upon amendment and termination of commercial contracts belong to the jurisdiction of commercial courts.'<sup>342</sup> This judgment was clearly inconsistent with the Ruling of Judge Kovtun of 29 October 2007.

264. B&P appealed this decision, and through the subsequent appeals, B&P maintained its objection to this breach of the *res judicata* principle. Hence, B&P elected hereafter not to address the University's claim for Termination of the 2003 Contract.<sup>343</sup> After all appeals were exhausted, Judge Khrypun's decision stood, which had the effect of terminating the 2003 Contract, and led to the eviction of B&P from the Science-Hotel Complex.<sup>344</sup>

265. The Claimants submit that the conduct of the Ukrainian courts evidences a clear breach of the *res judicata* principle, which they describe as a fundamental procedural safeguard which forms part of the fair and equitable treatment standard. The Claimants observe that, as regards the proceedings initiated by the University on 2 October 2007

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<sup>338</sup> Respondent's Counter-Memorial, para. 142.

<sup>339</sup> Kiev Commercial Court, Ruling 05-6-6/1061 (29 October 2007); Claimants' Memorial, p. 15; Respondent's Counter-Memorial, paras. 144-145.

<sup>340</sup> Kiev Commercial Court, Ruling of 23 November 2007 (Case No 32/619).

<sup>341</sup> Kiev Commercial Court, Judgment of 16 January 2008 (Case No 32/619).

<sup>342</sup> Judgment of 16 January 2008, p. 3, cited in Respondent's Counter-Memorial, para. 151.

<sup>343</sup> Respondent's Counter-Memorial, para. 150.

<sup>344</sup> Claimants' Post-Hearing Brief, para. 10.

(which came before Judge Kovtun, who issued Ruling 05-6-6/1061 on 29 October 2007), and the proceedings commenced on 2 November 2007 (which came before Judge Khrypyn, who issued a Ruling on 23 November 2007, opening the case, and the judgment on 16 January 2008), it can be seen that the parties were identical (B&P and the University); the object of the University's claim in both cases was identical (namely, to obtain a determination that B&P had breached the 2003 Contract and to terminate the 2003 Contract), and the grounds for the claim were also identical (namely, B&P's alleged fundamental breach of the 2003 Contract). The Claimants also note that the documents submitted before both courts were, for all material purposes, identical.<sup>345</sup> In the Claimants' submission, '[t]his is a clear cut case of the same action being brought twice.'<sup>346</sup> The Claimants contend that the Ukraine Ministry of Justice also 'abetted' the Ukrainian courts' breach, because representatives of the Ministry of Justice appeared before the Ukrainian courts and permitted the non-observance of *res judicata* to go uncorrected.<sup>347</sup>

266. Finally, the Claimants argue that the obligation to accord fair and equitable treatment under Article II(3)(a) of the BIT should be interpreted in light of its context, which includes the 'effective means' standard in Article II(7),<sup>348</sup> which provides that each Party 'shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations.'<sup>349</sup>

## 2. *Position of the Respondent*

267. The Respondent argues that the various proceedings before the Kiev Commercial Court were fair and transparent. In particular, in each of the proceedings, B&P had the right to be heard, on the merits, the opportunity to participate, and the right of appeal, and the proceedings followed the rule of law in all cases.<sup>350</sup> In the Respondent's submission, any prejudice that the Claimants suffered can be attributed to its own litigation strategy of maintaining its position that the BIT 'divested the Ukrainian courts of any jurisdiction to

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<sup>345</sup> Claimants' Post-Hearing Brief, para. 211.

<sup>346</sup> Claimants' Post-Hearing Brief, para. 213.

<sup>347</sup> Claimants' Post-Hearing Brief, para. 217.

<sup>348</sup> Claimants' Post-Hearing Brief, paras. 4, 218-220.

<sup>349</sup> BIT, Art II(7).

<sup>350</sup> Respondent's Post-Hearing Brief, para. 65.

hear claims related to the [2003 Contract], but without addressing the fall-back position of making defences on the merits to the University's claim for termination.'<sup>351</sup>

268. In consequence to the Claimants' claims concerning the courts' alleged non-compliance with the principle of *res judicata*, the Respondent submits that after Judge Kovtun had dismissed the University's statement of claim on 29 October 2007, the commencement of fresh proceedings by the University was consistent with Ukrainian law.<sup>352</sup> The Respondent asserts that under the Ukrainian Code of Commercial Procedure, 'a claim that is submitted to the courts is considered for preliminary review before the court officially "opens" the case', and prior to opening the case, 'the court must be satisfied that the materials presented by the plaintiff are "sufficient for acceptance of the claim for consideration".'<sup>353</sup> A statement of claim can be rejected on limited grounds, including, in Article 62(1) of the Code of Commercial Procedure, if the 'statement of claim is not subject to consideration by the commercial courts of Ukraine.'<sup>354</sup> Where this happens, the statement of claim is returned to the plaintiff with the ruling 'on the refusal to accept the statement of claim', and no case is opened.<sup>355</sup> But if the statement of claim is accepted by the court, it issues a ruling 'on the institution of court proceedings', and an official case number is given to the proceedings.<sup>356</sup>

269. The Respondent argues that the University's statement of claim which it filed on 2 October 2007 was rejected by Judge Kovtun on his Ruling of 29 October 2007 under Article 62(1) of the Code of Commercial Procedure. Accordingly, Judge Kovtun did not open a case, or assign an official number to the case.<sup>357</sup> Upon receiving Judge Kovtun's Ruling of 29 October 2007, Ms Salenko, the Head of the University's Legal Department, filed a duplicate of the statement of claim, rather than appealing Judge Kovtun's Ruling, because Ukrainian law does not prohibit refileing the statement of claim.<sup>358</sup>

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<sup>351</sup> Respondent's Post-Hearing Brief, para. 67.

<sup>352</sup> Respondent's Post-Hearing Brief, paras. 72-82.

<sup>353</sup> Respondent's Post-Hearing Brief, para. 72.

<sup>354</sup> Respondent's Post-Hearing Brief, para. 73.

<sup>355</sup> *Id.*

<sup>356</sup> Respondent's Post-Hearing Brief, para. 74.

<sup>357</sup> Respondent's Post-Hearing Brief, para. 75.

<sup>358</sup> Respondent's Post-Hearing Brief, para. 77.

270. The Respondent's submissions on the effect of Judge Kovtun's Ruling of 29 October 2007 were supported by the Expert Report of Professor Luts:

'The [Code of Commercial Procedure] prohibits the repeated submission of a claim in entirely different circumstances. The [Code of Commercial Procedure] distinguishes situations where the claim was not accepted for consideration by the court and the proceedings were not opened (dealt with in Article 62 of the [Code of Commercial Procedure]) and situations where the proceedings were opened upon a claim, but were, for specific reasons, terminated afterwards. In the latter case, [Code of Commercial Procedure] expressly stipulates that the claimant may not submit a claim related to the dispute between the same parties, over the same subject matter and based on the same grounds (see Article 80 of the [Code of Commercial Procedure]). Article 62 of the [Code of Commercial Procedure] contains no such stipulation.'<sup>359</sup>

Professor Luts' Expert Report was not challenged by the Claimants, and he was not called for cross-examination at the hearing. Nor did the Claimants provide any expert evidence of Ukrainian law of their own on this matter.<sup>360</sup>

271. The Respondent thus submits that there is a cardinal distinction between Articles 62 and 80 of the Ukrainian Code of Commercial Procedure. The provision in Article 80 of the Code of Commercial Procedure referred to by Professor Luts states that:

'[i]n case of termination of proceedings resubmission of an action to a commercial court in dispute between the same parties, on the same subject, under the same grounds shall not be accepted.'<sup>361</sup>

272. On the basis of these provisions of the Ukrainian Code of Commercial Procedure, the Respondent submits that Ukrainian courts' subsequent acceptance of the refiled statement of claim did not infringe the *res judicata* principle, for as a matter of Ukrainian civil procedure, *res judicata* does not attach to the dismissal of a statement of claim in a case that was never opened.<sup>362</sup> Accordingly, a ruling under Article 62 which refuses to accept a statement of claim is a procedural decision which does not conclusively determine any of the issues in dispute; but if a claim has been accepted for consideration and is later dismissed under Article 80, that claim cannot be reconsidered.<sup>363</sup> In addition, the

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<sup>359</sup> Luts ER, para. 47, cited in Respondent's Post-Hearing Brief, para. 80.

<sup>360</sup> Respondent's Post-Hearing Brief, para. 82.

<sup>361</sup> Code of Commercial Procedure, Art 80, cited in Respondent's Post-Hearing Brief, para. 84.

<sup>362</sup> Respondent's Post-Hearing Brief, para. 83.

<sup>363</sup> Respondent's Post-Hearing Brief, paras. 84-85.

Respondent submits that this is consistent with international practice, for only final judgments have preclusive effect.<sup>364</sup>

273. The Respondent further submits that the Ukrainian courts properly exercised jurisdiction over the dispute between the University and B&P. Article 13(1) of the 2003 Contract provided that: ‘All disputes between the Parties in connection to which no agreement has been reached shall be settled in accordance to the Ukrainian legislation.’ Article 15(1) further provided that: ‘In cases provided for in this Contract, the parties are governed by the current legislation of Ukraine.’<sup>365</sup>

274. The Respondent notes that under Article 12 of the Code of Commercial Procedure, the Kiev Commercial Court’s subject-matter jurisdiction includes ‘cases on disputes arising out conclusion, amendment, denunciation and execution of commercial contracts’,<sup>366</sup> and as the 2003 Contract was found by the Kiev Commercial Court to be a ‘commercial contract’, the University’s application for termination of the 2003 Contract is naturally within the jurisdiction of the Kiev Commercial Court. As has been noted above, the Respondent rejects the Claimants’ submission that the dispute between B&P and the University was falling within the scope of the BIT, and accordingly subject to the jurisdiction of ICSID, as ‘absurd’, for the BIT does not provide for the Respondent, as host State of the investment, to commence a claim against the Claimants. Rather, the BIT, like the vast majority of investment treaties, confers a right on the investor to bring a claim against the host State of the investment in international arbitration.<sup>367</sup> The Respondent also notes that the Claimants’ insistence on pursuing their argument that the Kiev Commercial Court lacked jurisdiction through the various proceedings and appeals in the Ukrainian courts, and their own strategic decision not to address the merits of the University’s termination of the 2003 Contract ‘serves to undermine all of their [fair and equitable treatment] claims regarding the conduct of the Ukrainian court proceedings.’<sup>368</sup> The Respondent further notes that, for the same reason, the Claimants cannot maintain any claim for breach of the ‘effective means’ obligation in Article II(7) of the BIT, whether in support of their claim for breach of the fair and equitable treatment standard,

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<sup>364</sup> Respondent’s Post-Hearing Brief, paras 87.

<sup>365</sup> 2003 Contract, Arts 13(1), 15(1), cited in Respondent’s Post-Hearing Brief, para. 93.

<sup>366</sup> Code of Commercial Procedure, Art 12, cited in Respondent’s Post-Hearing Brief, para. 94.

<sup>367</sup> Respondent’s Post-Hearing Brief, para. 96.

<sup>368</sup> Respondent’s Post-Hearing Brief, para. 99.

or as a stand-alone claim.<sup>369</sup> In the Respondent's submission, the Claimants failed to avail themselves fully of the remedies available before the Ukrainian courts, and that, in the absence of a denial of justice (which the Claimants have not substantiated), the Tribunal should not revisit the findings of the Ukrainian courts.<sup>370</sup>

275. Finally, the Respondent rejects the Claimants' suggestion that representatives of the Ministry of Justice 'abetted' the Ukrainian courts in any breach of Article II(3)(a) of the BIT is unsustainable, because the Ministry of Justice representatives 'did not in any way prevent B&P from presenting its case before the Ukrainian courts or otherwise dictate the outcome of the termination proceedings.'<sup>371</sup>

### 3. *Determination of the Tribunal*

276. The Tribunal notes that the Claimants' claim concerning the conduct of the Ukrainian courts and the Ministry of Justice in relation to the termination proceedings before the Ukrainian courts essentially concerns whether the initiation by the University of fresh proceedings on 2 November 2007, and the Kiev Commercial Court's acceptance of those fresh proceedings, amounted to a violation of the *res judicata* principle and consequently a breach of the obligation to accord fair and equitable treatment contrary to Article II(3)(a) of the BIT.

277. The Tribunal accepts the Claimants' submission that *res judicata* is a general principle of law.<sup>372</sup> The Respondent does not seek to contest this.

278. The principle of *res judicata* also is contained in the Ukrainian Code of Commercial Procedure. That Code draws a distinction between a ruling of a Ukrainian court that, for instance, 'the statement of claim is not subject to consideration by the commercial courts of Ukraine' (Article 62), in which case the court's ruling does not have the effect of opening a case, and the ruling does not have any preclusive effect; and a decision of a Ukrainian court that terminates proceedings (Article 80), to which *res judicata* would

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<sup>369</sup> Respondent's Post-Hearing Brief, paras. 109-112.

<sup>370</sup> Respondent's Post-Hearing Brief, paras. 113-129.

<sup>371</sup> Respondent's Post-Hearing Brief, para. 108.

<sup>372</sup> See, e.g., Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, 1987 ed), p. 336.

attach. Professor Luts' expert report in support of this position was not challenged by the Claimants.

279. The Tribunal accepts the testimony of Professor Luts, and finds that the Kiev Commercial Court's acceptance of the University's statement of claim, filed on 2 November 2007, did not violate the *res judicata* principle under applicable Ukrainian law.

280. The Claimants deny the relevance of Ukrainian law on the basis that 'the issue is governed by international law.'<sup>373</sup> However, the Tribunal considers that in order to determine whether the Respondent is in breach of the fair and equitable treatment standard, the Tribunal is required to assess, *inter alia*, whether the law applicable to the proceedings before the Ukrainian courts to which B&P was a party (namely Ukrainian municipal law) was properly and fairly applied. The Tribunal considers that this primarily is a question to be determined under Ukrainian law. It is only in a situation where those proceedings would '[offend] a sense of judicial propriety' that it would be open to the Tribunal to find that those proceedings did not meet international standards.<sup>374</sup> However, to apply a provision of Ukrainian law in a non-discriminatory fashion will rarely give rise to a breach of an international standard, such as the fair and equitable treatment obligation in Article II(3)(a). In this regard, the Tribunal is not assisted by Article II(7) of the BIT, which contains a separate substantive standard of protection.

281. The Tribunal has no reason to reject the testimony of Professor Luts. The application of the *res judicata* principle in Ukrainian civil procedure may or may not differ from that in other jurisdictions, but it does not at all reach the threshold for offending a sense of judicial propriety. Equally, the fact that certain legal systems recognise that it is only final judgments that attract the status of *res judicata*, rather than all procedural decisions made by a court or tribunal, also does not offend such a principle.<sup>375</sup>

282. For these reasons, it does not appear to the Tribunal that it has any ground to reject the decision of the Ukrainian courts as correctly stating the position under Ukrainian law on the *res judicata* issue.

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<sup>373</sup> Claimants' Post-Hearing Submissions, para. 215.

<sup>374</sup> See, e.g., *Loewen Group, Inc v United States* (ICSID Case No ARB(AF)/98/3), Award of 26 June 2003, para. 132; cited in Respondent's Counter-Memorial, para. 387.

<sup>375</sup> As was submitted by the Respondent: Respondent's Post-Hearing Brief, para. 87.

283. The Tribunal does not find that the Claimants were in any way denied due process in the various proceedings before the Ukrainian courts. To the contrary, B&P had every opportunity to present its case. Its submissions to jurisdictional defences that the subsequent proceedings were inconsistent with Judge Kovtun's Ruling of 29 October 2007 and the principle of *res judicata*, and its claim that the dispute arising out of the 2003 Contract was subject to ICSID jurisdiction, and was outside the jurisdiction of the Ukrainian courts. It might also have presented defences on merits issues, but elected not to do so.

284. In this regard, it seems to the Tribunal that the Claimants are bound by their litigation strategy and its consequences. The Claimants made a conscious election not to raise non-jurisdictional defences. Indeed, that position was maintained before the Tribunal and in post-hearing submissions. Having elected to proceed in that way, the Claimants cannot now contest the result.

285. Finally, the Tribunal observes that the evidence does not establish that the representatives of the Ministry of Justice in any way 'abetted' the Ukrainian courts in any breach of the BIT. The representatives of the Ministry of Justice did not hinder B&P's ability to appear and make submissions in the Ukrainian court proceedings, and even if they advanced a position consistent with that presented by the University, the Claimants have failed to demonstrate that this was a breach of Ukraine's obligation under Article II(3)(a).

286. Accordingly, the Tribunal rejects the Claimants' claims for breach of Article II(3)(a) arising out of the Ukrainian court proceedings.

## **VIII. COSTS**

287. The BIT does not contain a rule on the allocation of costs. The ICSID Convention provides in Article 61(2) that:

‘In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.’<sup>376</sup>

288. This provision, together with Rule 28(1) of the ICSID Arbitration Rules, gives the Tribunal broad discretion to decide on the allocation of costs. It does not contain a rule that ‘costs follow the event’, in the sense that the unsuccessful party is required to pay the successful party’s costs; nor does the broad body of arbitral practice suggest that this is the approach which should be followed in ICSID arbitration proceedings.

289. The Respondent’s stated costs, apart from ICSID fees of \$303,945, amount to USD 914,920 and UAH 17,331 (which the Tribunal understands to amount to \$2,101). The Claimants’ costs are in the order of USD 1,322,770 (exclusive of ICSID fees). It appears to the Tribunal that it may regard the costs of each party as having been reasonably incurred.

290. In the result, the Respondent has prevailed in this dispute. The Claimants’ claims have been rejected in their entirety. The Respondent has requested that the Tribunal order that the Claimants bear all of the costs incurred by the Respondent in this arbitration. It makes this request in view of the costs incurred in, *inter alia*, arranging better English language translations of exhibits referred to by the Claimants; the two delays in the scheduling of the hearing which were occasioned by the Claimants’ requests for extension of time to complete their Reply, and the Claimants’ subsequent change of counsel; the Claimants’ insistence that the hearing take place in Washington DC when most of the witnesses were located in Europe; and the work involved in preparing defences to various claims and arguments advanced by the Claimants which were later abandoned. For their part, the Claimants request that, in the event that their claims are dismissed, the parties should be ordered to bear their own costs.

291. The Tribunal notes that in some cases, where the unsuccessful claimant has engaged in some form of abusive conduct, arbitral tribunals have ordered that the claimant pay all

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<sup>376</sup> ICSID Convention, Art 61(2).

or a significant part of the respondent's costs.<sup>377</sup> The Tribunal does not consider, however, that the present case falls into this category. The Claimants had serious and credible claims under the BIT that were not presented in a way which raised questions of procedural propriety, and the Claimants' counsel represented their clients in a professional manner at the hearings. The Tribunal therefore rejects the Respondent's request that a 'costs follow the event' approach be applied in a blanket way in this case.

292. The Tribunal is conscious, however, that certain costs were incurred by the Respondent in responding to the Claimants' case as the arbitration progressed, as has been noted above, and that the substantive hearing in this arbitration had to be delayed twice due to requests from the Claimants. In all the circumstances, the Tribunal considers it is appropriate to order the Claimants to make a contribution to these additional costs that would not have been incurred but for the actions of the Claimants. The Tribunal determines that a reasonable sum in this respect, excluding the Respondent's share of ICSID's fees, is one-sixth of the Respondent's costs, rounded to the sum of USD 150,000.

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<sup>377</sup> See, e.g., *Europe Cement Investment & Trade SA v Turkey* (ICSID Case No ARB(AF)/07/2), Award of 13 August 2009, paras. 182-186; *Cementownia 'Nowa Huta' SA v Turkey* (ICSID Case No ARB(AF)/06/2), Award of 17 September 2009, paras. 173-178; *Libananco Holdings Co Limited v Turkey* (ICSID Case No ARB/06/8), Award of 2 September 2011, paras. 557-569; *Saba Fakes v Turkey* (ICSID Case No ARB/07/20), Award of 14 July 2010, paras. 150-155; *Rachel Grynberg, Stephen Grynberg, Miriam Grynberg and RSM Production Corporation v Grenada* (ICSID Case No ARB/10/6), Award of 7 December 2010, paras. 8.3.1-8.3.6; and *Phoenix Action Ltd v Czech Republic* (ICSID Case No ARB/06/5), Award of 15 April 2009, paras. 148-152.

## IX. DISPOSITIVE PART

The Tribunal determines as follows:

1. Each of the Claimants' claims is within the jurisdiction of the Tribunal, and the Claimants' claim under Article II(3)(c) is admissible.
2. The conduct of the Ukrainian Courts, the CRO and the Ministry of Justice is attributable to Ukraine, but the conduct of the University that is the subject of these proceedings is not attributable to Ukraine.
3. With regard to the Claimants' claims:
  - a. the Respondent has not breached its obligations under Article II(3)(a) or Article III of the BIT by the conduct of the CRO.
  - b. the Respondent has not breached Article II(3)(a) of the BIT through the conduct of the University.
  - c. the Respondent has not breached Article II(3)(c) of the BIT through the conduct of the University as regards the 2003 Contract.
  - d. the Respondent has not breached Article II(3)(a) of the BIT through the conduct of the Ukrainian courts and the conduct of the Ministry of Justice.
4. On the issue of costs, the Claimants are ordered to pay to the Respondent the amount of USD 150,000.

Dr Gavan Griffith QC

President

Date: 17. 10. 2012

Professor Philippe Sands QC

Arbitrator

Date: 15 October 2012

Professor Donald McRae

Arbitrator

Date: 22 October 2012